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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSE M. TOURON,

Petitioner,

Versus

METROPOLITAN DADE COUNTY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Jose M. Touron,
8037 Lake Drive, #103
Miami, Florida 33166-7702
(305) 599-3199
pro se.

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QUESTIONS PRESENTED

The questions presented in this petition arise from the discharge of Petitioner, Jose M. Touron, from Respondent, Metropolitan Dade County's Police Department.

The questions presented are:

1. Whether the doctrine of res judicata is applicable as grounds for summary judgment in a case where the basis for res judicata is a county administrative decision rendered in the context of a non-binding arbitration where the arbitrator did not have subject matter jurisdiction and which was reviewed by the appellate division of the state circuit court pursuant to a court order to exhaust administrative remedies and where the arbitration itself concerned a termination of employment pursuant to a Collective Bargaining Agreement and the underlying case was brought to redress violation of civil rights pursuant to the First and Fourteenth Amendments of the U.S. Constitution, Title VII, and 42 U.S.C. § 1983 arising from the wrongful discharge as well as the arbitration process.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Shelby Highsmith, Judge, U.S. District Court Judge

Stephen T. Brown, Magistrate Judge

Jose M. Touron (Petitioner/Plaintiff, pro se)

Carol Ann Anderson, Esq. (as counsel for Defendants and as defendant)

Joaquin Avino (defendant)

Robert A. Ginsburg, Esq. (defendant)

Donald Matthews (defendant)

Metropolitan Dade County (defendant)

Robert Otero (defendant)

Philip Pitruzzello (defendant)

Fred Taylor (defendant)

Vicki Todaro (defendant)

Jesse Varnell (defendant)

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings ii

Table of Authorities iv

Opinions Below 1

Jurisdictional Statement 1-2

Constitutional Provision Involved 2

Statement of the Case 2-7

Reasons for Granting the Writ 7

I The District Court's Opinion Conflicts With the Decisions of This Court Setting Forth the Standards by Which Res Judicata Applies When Arbitral Processes Are Involved. It Also Raises an Important Question of Federal Law That Has Not Been, But Should Be Directly Resolved by This Court - Whether Res Judicata Applies To A Judgment Entered by A Court That Did Not Have Subject Matter Jurisdiction. 8

Conclusion 24

Appendix 26

TABLE OF AUTHORITIES

Pages

Alexander vs. Gardner-Denver,
94 S.Ct. 1011 (1974) 8, 10, 15, 16, 17

Barrentine vs. Arkansas-Best Freight System,
450 U.S. 728 (1981) 14, 15, 16, 20

Berenguer vs. Metropolitan Dade County,
4 Fla. Supp.2d 137 (Fla. 11th Jud. Cir. App. Div. 1983) . . 12

Cleveland Board of Education vs. Loudermill,
105 S.Ct. 1487 (1985) 24

Gilmer vs. Interstate/Johnson Lane Corp.,
111 S.Ct. 1647 (1991) 20

Healy vs. Town of Pembroke Park,
831 F.2d 989 (11th Cir. 1987) 8, 22

Holley vs. Seminole County School Dist.,
763 F.2d 399 (11th Cir. 1985) 17, 18

I.A. Durbin, Inc. vs. Jefferson National Bank,
793 F.2d 1541 (11th Cir. 1986) 8

Kremer v. Chemical Construction Corp.,
456 U.S. 461 (1982) 7, 9, 11

Lum vs. City and County of Honolulu,
728 F.Supp. 1452 (Ha. 1989) 8, 21, 22

McKinney vs. Pate,
20 F.3d 1550 (11th Cir. 1994) 13

Pages

McDonald vs. City of Westbranch, Michigan,
104 S.Ct. 1799 (1984) 7, 11, 12, 13, 14, 18, 19, 20, 21

Metropolitan Dade County vs. Sokolowski,
439 So.2d 932 (Fla. 3d DCA 1983) 12

Narcisse vs. Dade County,
20 Fla. Supp.2d 131 (Fla. 11th Jud. Cir. App. Div. 1986). . 13

Patsy vs. Board of Regents of the State of Florida,
102 S.Ct. 2557 (1982) 10

Universal American Barch Corp. vs. J. Camp, Inc.,
946 F.2d 1131 (5th Cir. 1991) 8, 23

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OPINIONS BELOW

The April 26, 1995, order of the Court of Appeals affirming the lower court's order and denying panel rehearing is not reported and is attached at page 1 of the accompanying appendix to this petition.

The District Court's order of October 27, 1993, has not been reported. It is reprinted at pages 3 to 13 of the appendix.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals affirming, per curiam,

the District Court's order and denying the petition for panel rehearing was entered on April 26, 1995. The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In 1976, Plaintiff/Appellant, JOSE M. TOURON, JR. ("TOURON"), was employed as a police officer with METROPOLITAN DADE COUNTY ("METRO-DADE"). In 1986, TOURON was suspended and relieved from duty with pay from the METRO-DADE Police Department, under house arrest, pending the outcome of an internal investigation. The basis of the internal investigation centered around alleged violations of Florida law. The Dade County State Attorney's Office was presented this case and declined to prosecute, stating that TOURON had not violated Florida law. METRO-DADE then chose to continue to pursue TOURON's termination on those grounds, internally through its administrative process, despite the State Attorney's decision. Pursuant to § 112.531, Florida Statutes, TOURON should have been notified of: 1) the

charges pending against him, 2) the name of the investigating officer, and 3) the names of all person making charges against him. METRO-DADE, however, did not comply with Florida law and provide him with this information. On June 12, 1986, as a result of these actions, or lack of action, TOURON filed a complaint against METRO-DADE in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, Case No.: 86-24040 CA (04), for determination of his rights as a police officer pursuant to Chap. 112, Florida Statutes, seeking relief from denial of due process. That same day, METRO-DADE was ordered to comply with Chapter 112, Florida Statutes, and within 30 days inform TOURON as to the nature of the complaints brought against him and subject of the pending investigation which lead to his relief from duty. On January 6, 1987, METRO-DADE finally complied with the court's order and served upon TOURON a disciplinary action report. On February 6, 1987, the Circuit Court ordered TOURON to exhaust his administrative remedies.

In the mean time, on May 27, 1987, TOURON received a letter of proposed termination from the Director of the Metropolitan Dade County Police Department. Pursuant to the Collective

Bargaining Agreement ("CBA") between the Police Benevolent Association ("PBA"), of which TOURON was a member, and METRO-DADE, and to the Circuit Court's order that he exhaust his administrative remedies, TOURON exercised his rights and requested non-binding arbitration on his request for reinstatement, bearing in mind that the hearing examiner is authorized to hear only those issues raised within the CBA, namely TOURON's proposed discharge. A hearing examiner was chosen and appointed by METRO-DADE from a list provided by the American Arbitration Association pursuant to the agreement between the PBA and METRO-DADE. The CBA provided that all hearing examiners shall be licensed attorneys. This is reinforced in METRO-DADE Police Department S.O.P. 4-14 and METRO-DADE County Code 2-47. METRO-DADE, however, unilaterally and in violation of the CBA, and its own county code and standard operating procedures for the police department, removed the appointed hearing examiner, an attorney, and substituted its own choice for hearing examiner, a non-attorney. TOURON objected to the appointment of the new hearing examiner because the hearing examiner was unqualified to hear the arbitration of the wrongful termination and moved to have the arbitrator disqualified. TOURON also objected to

METRO-DADE's failure to provide discovery pursuant to his requests for discovery and production of witnesses. The hearing was, nonetheless, held over TOURON's objections. TOURON's motions were denied.

On August 10, 1989, the hearing examiner submitted his report (attached at pages 28 to 50 to the Appendix) and recommended that TOURON's request for reinstatement be denied. However, he did recommend that TOURON be rehired on condition that TOURON, in essence, apologize and recognize his mistake. The hearing examiner's recommendations were sent to the Office of the County Manager. The County Manager, in a letter dated October 24, 1989, terminated TOURON. TOURON was never given the opportunity to apologize or meet with the County Manager.

On November 9, 1989, pursuant to the Circuit Court's order, TOURON filed a Notice of Appeal in the Appellate Division of the Eleventh Circuit, in and for Dade County, Florida, to exhaust his administrative remedies. As his basis for appeal, the appellate brief raised violations of substantive and procedural due process within the arbitral process. In the interim, TOURON filed a complaint against METRO-DADE in the Circuit Court of the Eleventh Judicial Circuit,

in and for Dade County, Florida, Case No.: 90-02939 CA (32), based upon a Whistleblower cause of action. The Circuit Court case is pending a final determination. The Appellate Division affirmed the administrative decision rendered by the hearing examiner, per curiam, in an opinion dated March 20, 1991.

Since the statute of limitations was running with regard to a § 1983 cause of action, TOURON chose to pursue the matter further in federal court and on May 29, 1991, TOURON filed the complaint in the lower court asserting violation of his civil rights pursuant to Title VII, 42 U.S.C. § 1983, and other violations of the U.S. Constitution, against METRO-DADE, as well as several other defendants, individually and in their official capacity. The violations of which TOURON complained occurred at the time of his discharge as well as during the arbitral process. Summary judgment was entered on October 27, 1993, against TOURON and in favor of METRO-DADE based on res judicata. The memorandum opinion entered by the Court, however, does note that the Arbitrator did deny TOURON's motion to remove himself. TOURON appealed the memorandum opinion to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed the District Court's order, per curiam, and denied rehearing on April 26,

1995.

REASONS FOR GRANTING THE WRIT

This petition presents constitutional issues of exceptional importance arising in a wrongful discharge case. The issues presented have never been addressed fully by this Court. As is, the District Court's ruling conflicts with this Court's rulings in other cases.

This lawsuit commenced close to four years ago on violations of civil rights that occurred over nine years ago. The District Court's actions, affirmed by the Eleventh Circuit, per curiam, would serve only to abrogate CBA. At this point, no one would bother to pursue matters through a CBA if later those actions would prevent one from pursuing a civil rights violation. The issues at stake will affect all individuals who pursue their rights under CBAs and non-binding arbitrations. For the reasons set forth below, the Court should grant the writ of certiorari and resolve these important issues.

In reaching its decision to grant summary judgment the District Court relied on Kremer vs. Chemical Construction Corp., 456 U.S. 461 (1982), for the proposition that a federal court may give a state court decision preclusive affect. However, the District Court ignored the rulings of this Court in McDonald vs. City of Westbranch,

Michigan, 104 S.Ct. 1799 (1984), and Alexander vs. Gardner-Denver, 94 S.Ct. 1011 (1974), and of the Eleventh Circuit Court of Appeals in Healy vs. Town of Pembroke Park, 831 F.2d 989 (llth Cir. 1987). The District Court's ruling and the Eleventh Circuit's affirmance also conflict with the courts' rulings in Lum vs. City and County of Honolulu, 728 F.Supp. 1452 (Ha. 1989) and Universal American Barch Corp. vs. J. Camp, Inc., 946 F.2d 1131 (5th Cir. 1991).

I. The District Court's Opinion Conflicts With the Decisions of This Court Setting Forth the Standards by Which Res Judicata Applies When Arbitral Processes Are Involved. It Also Raises an Important Question of Federal Law That Has Not Been, But Should Be Directly Resolved by This Court - Whether Res Judicata Applies To A Judgment Entered by A Court That Did Not Have Subject Matter Jurisdiction.

In order for the doctrine of res judicata to bar a subsequent suit, four elements must be present: (1) there must be a final judgment on the merits; (2) the decision must be rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases. I.A. Durbin, Inc. vs. Jefferson National

Bank, 793 F.2d 1541 (11th Cir. 1986). Applying the Durbin elements of res judicata to this case, the arbitration award serves as a final judgment, insofar as a non-binding arbitration is final, but only as to the merits of TOURON's request for reinstatement, since it was TOURON's request for reinstatement that was the subject matter of the arbitration hearing, not a cause of action under § 1983. TOURON's request for reinstatement has been fully litigated. However, violations of TOURON's civil rights have not been adequately addressed. TOURON is seeking redress for violations of his civil rights in the underlying case arising from substantive and procedural due process violations that occurred in the discharge and arbitral proceedings. That the Court may award reinstatement as a remedy for violation of his civil rights does not mean that TOURON is relitigating that which was heard at the arbitration.

The District Court relied on Kremer vs. Chemical Construction Corp., 456 U.S. 462 (1982), in support of its decision. Kremer was incorrectly analogized to the case at bar, however. The decision in Kremer involved an administrative agency decision properly before that agency. The state agency involved in Kremer, the New York State Division of Human Rights, had to review the Plaintiff's allegations of

civil rights violations and render a decision before the Equal Employment Opportunity Commission (E.E.O.C.) could review the matter. In this case, TOURON sought review of the arbitrator's decision before the Appellate Division of the 11th Judicial Circuit of Florida insofar as it concerned the CBA and by order of the Eleventh Judicial Circuit (see page 14 the appendix).[1] TOURON did not argue violations of his civil rights in his termination, he argued that he was terminated without cause under the CBA. TOURON is not seeking review of the arbitrator's decision, he is seeking review of the violation of his civil rights. "[I]n instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." Alexander vs. Gardner-Denver Co., 415 U.S. 36, 55 (1974). This is exactly the case.

28 U.S.C. § 1738 obligates federal courts to give the same preclusive effect to state court judgments as would the state court. This is the crux of METRO-DADE's argument. However, what

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[1]The Eleventh Judicial Circuit wrongfully ordered TOURON to exhaust his administrative remedies. See, Patsy vs. board of Regents of the State of Florida, 102 S.Ct. 2557 (1982). TOURON should not be penalized for the state court's mistake.

METRO-DADE fails to mention is that the Supreme Court has concluded that § 1738 does not apply in civil rights violations cases. "Arbitration decisions [in discrimination cases] are not subject to the mandate of § 1738." Kremer vs. Chemical Construction Corp., 456 U.S. at 477. See also, McDonald vs. City of West Branch, Michigan, 466 U.S. 284 (1984). For whatever reason, the District Court does not acknowledge this aspect of Kremer.

The second element, delineated in Durbin above, addresses the court's jurisdiction to hear the matter. Even if the hearing examiner in this case was competent to hear the matter before him, the examiner was competent only to the extent that he could hear TOURON's request for reinstatement insofar as a hearing examiner could hear the arbitration of TOURON's request for reinstatement. "[A]n arbitrator's expertise pertains to the law of the shop, not the law of the land . . . An arbitrator may not, therefore, have the expertise required to resolve the complex legal questions that arise in 1983 actions." McDonald vs. City of Westbranch, Michigan, 104 S.Ct. 1799, 1802 (1984). In McDonald, the Supreme Court addressed the issue of whether preclusive effect should be given to an arbitral award in an action for civil rights violations. In that case, a police officer also sought to

arbitrate a grievance for discharge without cause pursuant to a CBA. The Court concluded that:

> in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial . . . [A] federal court should not afford res judicata or collateral estoppel to effect an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement.

McDonald vs. City of West Branch, Michigan, 466 U.S. at 292-93. In this case, the hearing examiner was not competent to decide whether TOURON's civil rights were violated and such issues would not be properly before him. The hearing examiner never addressed violations of federal rights perpetrated on TOURON by Metropolitan Dade County and Defendants, nor could he. The Appellate Division never addressed these issues and refused to hear TOURON's request for oral argument, therefore failing in their obligation to consider these issues as they have in the past in other cases. See, Berenguer vs. Metropolitan Dade County, 4 Fla. Supp.2d 137 (Fla. 11th Jud. Cir. App. Div. 1983) (attached at pages 67 to 70 to the appendix); see also, Metropolitan Dade County vs. Sokolowski, 439 So.2d 932 (Fla. 3d DCA 1983). The Appellate Division's refusal to hear and address those issues presented to it by TOURON,

amounted to a refusal to provide a process sufficient to remedy procedural deprivation. See, McKinney vs. Pate, 20 F.3d 1550 (11th Cir. 1994). What's more, the Appellate Division of the Eleventh Judicial Circuit, in and for Dade County, Florida, could not have properly entertained the issue of violation of TOURON's civil rights. In Narcisse vs. Dade County, 20 Fla. Supp.2d 131 (Fla. 11th Jud. Cir. App. Div. 1986)(attached at pages 62 to 66 of the appendix), the Court stated: "A court reviewing administrative action is limited in its scope of review to an inquiry into whether the determinative action is supported by substantial competent evidence." Narcisse vs. Dade County, 20 Fla. Supp.2d at 132. The determinative action was his termination based upon the findings of the Arbitrator. This is all the Appellate Division could hear -- nothing more. Therefore, the Appellate Division did not have subject matter jurisdiction to hear a claim of violation of civil rights.

Assuming, arguendo, that McDonald and its progeny do not dispose of the defense argument for res judicata, a review of the record clearly demonstrates that the procedural and substantive due process issues raised in this court were never properly before the arbitrator nor necessary for the adjudication of that matter. The issue before the

arbitrator was whether the plaintiff violated departmental rules and policies of the Metro Dade Police Department and, if so, did the violations constitute just cause for his discharge. The Court in McDonald addresses the issue of the arbitrator's competency to handle § 1983 claims. The Court states:

> First, an arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land." Gardner-Denver, supra at 57. An arbitrator may not, therefore, have the expertise required to resolve the complex legal questions that arise in 1983 actions. Second, because an arbitrator's authority derives solely from the contract, Barrentine, supra at 744, an arbitrator may not have the authority to enforce 1983. As we explained in Gardner-Denver: "the arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties . . . If an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than an interpretation of the collective bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." 415 U.S. at 53, quoting Steel Workers vs. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). McDonald vs. City of Westbranch, Michigan, 104 S.Ct. at 1802.

Even if TOURON had in fact argued violations of his civil rights before the arbitrator, the arbitrator still was not the proper forum. He was not competent as he did not have subject matter jurisdiction to hear the matter before him.

> Arbitral procedures, while well suited to the resolution of contractual disputes, makes arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.

Alexander vs. Gardner-Denver Co., 415 U.S. at 56. This rule was repeated in Barrentine vs. Arkansas-Best Freight System, 450 U.S. 728 (1981). Barrentine concerned claims brought under the Fair Labor Standards Act. In that case, plaintiffs had brought their grievances before an arbitrator under a CBA and later filed an action under the Fair Labor Standards Act. The Defendant had argued that the Plaintiffs' action should be barred by res judicata. Plaintiffs asserted that their claims were independent of the CBA, as does TOURON. The Court held that the arbitrator's power arises from the CBA limiting it to conflicts arising within the agreement and therefore the arbitrator has no general power to invoke what the court called the law of the land or those arising from statutes. The arbitrator in that case could not resolve claims centered on the Fair Labor Standards Act. In this case, the arbitrator could not properly hear claims arising under Title VII, even if they were brought before him. He had no authority to do so.

In Alexander vs. Gardner-Denver Co., the plaintiff filed a

grievance under a CBA alleging discrimination. The grievance was brought before an arbitrator under the CBA, who later ruled that the plaintiff's discharge was for cause, just as in the case at bar. The plaintiff filed suit under Title VII. The defendant filed a motion for summary judgment, grounding their argument on res judicata. The trial court found in favor the defendant, just as in this case, as did the appellate court. The Supreme Court granted the plaintiff's application for certiorari. The Court addressed the issue before this court and ruled that in a case such as this

> the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.

Alexander vs. Gardner-Denver Co., 415 U.S. at 59-60 (emphasis added). In its decision the Court recognized several points. First, the Court pointed out that the individual's rights may be subordinated during the arbitration to the collective interests of those covered by the agreement. Alexander vs. Gardner-Denver Co., 415 U.S. at fn. 19. See also, Barrentine vs. Arkansas-Best Freight System, 450 U.S. at 742. Second, the Court acknowledged that the factfinding

process in an arbitration is not equal to the same process in a judicial setting. Alexander vs. Gardner-Denver Co., 415 U.S. at 57. This is evident in TOURON's case. METRO-DADE argues that TOURON had an opportunity to litigate his claims before a hearing examiner. METRO-DADE states that the arbitration was stopped when witnesses TOURON had wanted to call were not available. TOURON only stopped the arbitration because of his frustration with the lopsidedness of the proceedings. The arbitrator refused to invoke his subpoena powers, and thus, TOURON was never able to "litigate" any of his claims, much less the underlying action for violation of his civil rights because he was never able properly compel the appearance of his witnesses as he would have been able to in a judicial proceeding. TOURON was completely thwarted in his attempts to conduct meaningful discovery of his grievance.

The Eleventh Circuit addressed the preclusive effect of state administrative proceedings in a civil rights action in Holley vs. Seminole County School Dist., 763 F.2d 399 (llth Cir. 1985). Holley was a teacher who brought a civil rights action against a school board when his contract was not renewed. In that case, the Seminole County School District argued, on rehearing, that the teacher had presented his

claim of violation of his civil rights to the Georgia Board of Education prior to bringing suit in federal court and that it was therefore precluded by the doctrine of res judicata. The Court declined to rule because Appellee had not addressed this issue sufficiently. However, the Court noted that res judicata of administrative proceedings was an open question and depended on the character of the administrative proceeding and the type of claim being asserted in the federal action. The Court cited to McDonald, supra, and noted specifically in a footnote:

> Moreover, even if appellees' [Seminole County] claim of administrative preclusion were otherwise viable, preclusion may have been unavailable in this case because the administrative tribunals failed to give appellant a 'full and fair hearing" on his First Amendment claim.

Holley vs. Seminole County School Dist., 763 F.2d at 400, Fn 1. The same can be said of TOURON's case. TOURON's claim of violation of his First Amendment rights, as well as other rights as guaranteed by the U.S. Constitution, were not "fully and fairly" heard and therefore should not be given preclusive effect. Since the Eleventh Circuit itself has failed to address this issue, this Court should accept Petitioner's invitation to do so.

The fourth element in Durbin concerns the causes of action involved. The causes of action must be the same in order to apply the doctrine of res judicata. In this case they are not. TOURON only sought reinstatement at the arbitral level. Here, he is seeking damages, including reinstatement, for violation of his civil rights. The violation of his civil rights arose from his wrongful termination and the arbitral process itself. TOURON asserts a claim under § 1983; he maintains that he was dismissed for exercising his First Amendment rights: reporting illegal conduct and corruption within the Metro-Dade Police Department and County and exposure of carbon monoxide and aviation fuel at Miami International Airport -- that is the basis for his claim of wrongful termination. TOURON also complains about the violation of his rights during the arbitral process itself. The arbitration and subsequent appeal concerned his dismissal and request for reinstatement; they simply are not the same causes of action of which TOURON is now complaining.

The Supreme Court has disposed of the notion that an arbitration should be given res judicata effect. In McDonald vs. City of Westbranch, Michigan, 104 S.Ct. 1799 (1984), the court rejected the notion that an arbitrator's decision would constitute res judicata to

prevent the plaintiff from pursuing a cause of action under 1983. The Court noted:

> [W]e find the doctrines of res judicata and collateral estoppel inapplicable . . . . And, although arbitration is well suited to resolving contractual disputes, our decisions in Barrentine and Gardner-Denver compel the conclusion that it can not provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent 1983 action would undermine that statute's efficiency in protecting federal rights.
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> * * * * *
>
> It is apparent, therefore, that in a 1983 action, an arbitration proceeding can not provide an adequate substitute for a judicial trial. Consequently, according preclusive effect to arbitration awards in 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide. We therefore hold that in a 1983 action a federal court should not afford res judicata or collateral estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective bargaining agreement.

McDonald, 104 S.Ct. at 1802-1803. Just as in McDonald, TOURON's arbitration was brought pursuant to the terms of a CBA, and what's more, he had been ordered to do so by the state court.

The Court, in Gilmer vs. Interstate/Johnson Lane Corp., 111 S.Ct. 1647 (l991), left no doubt that its holding in McDonald stands

for the proposition that an arbitral proceeding cannot be used for res judicata or collateral estoppel purposes so as to preclude a party from seeking federal judicial redress for deprivation of constitutional rights under color of state law pursuant to 42 U.S.C. 1983.

As noted in footnote nine in McDonald, 104 S.Ct. at 1802 "indeed, many arbitrators are not lawyers." In point of fact, the arbitrator was not a qualified arbitrator pursuant to the Metropolitan Dade County Code. The arbitrator was a professor of educational administration by occupation, not an attorney, and did not meet the requirements necessary to be in the position of arbitrator (see attachments at page 71 of the appendix). TOURON gave the unqualified arbitrator an opportunity to remove himself and he refused thereby violating TOURON's federal due process rights.

In Lum vs. City and County of Honolulu, 728 F.Supp. 1452 (Ha. 1989), the court analyzes the issue of res judicata as it pertains to an arbitrator's award. The court rejected the notion that an arbitrator's award that is confirmed by a court can have res judicata effect so as to preclude a plaintiff from pursuing a cause of action under 1983. Lum is a very appropriate case since the statute at issue which permitted judicial review of an arbitrator's award tracks the language of the

Florida statute under which the case at hand was addressed. The court in Lum noted that limited judicial review is afforded to the merit of the claim and the arbitrator is limited in jurisdiction in deciding the contractual issues and not the constitutional issues involved in a particular case, just as in TOURON's case. The District Court's ruling, therefore, directly conflicts with the Court in Lum.

In Healy vs. Town of Pembroke Park, 831 F.2d 989 (llth Cir. 1987), the Eleventh Circuit reiterated its stand on the issue of res judicata of administrative agency decisions. In that case, four police officers brought a civil rights action against the city, mayor and commissioners of Pembroke Park. The civil rights violations occurred when the defendants had breached a CBA. The plaintiffs had brought their complaint regarding breach of the agreement before an administrative agency and later sought damages for civil rights violations. The defendants argued that the plaintiffs were barred from recovering damages under the doctrine of res judicata. The Court stated:

> "In the Eleventh Circuit it is well settled that res judicata will not operate to bar matters which were not raised before an administrative agency and over which it did not have jurisdiction." Healy vs. Town of Pembroke Park, 831 F.2d at 992.

The same can be said of the underlying case. TOURON could not raise violations of his civil rights before the hearing examiner because the hearing examiner did not have jurisdiction, in any case, to hear those allegations. TOURON also assailed the very process of the arbitration. He has raised several issues which claim that the entire arbitration process was so infirm that it deprived him of both procedural and substantive due process. A fair reading of Universal American Barch Corp. vs. J. Camp, Inc., 946 F.2d 1131 (5th Cir. 1991), leads to the inevitable conclusion that where the very procedure is challenged as being violative of rights protected by federal constitution and laws, the process that is challenged can not form the basis for the affirmative defense of res judicata. In Universal, the court noted that "in an arbitrable case not directly involving federal statutory or constitutional rights, courts should use a case-by-case approach to determining the collateral estoppel effects of arbitral findings." The court in Universal pointed out that the arbitral panel involved in that case were experienced and disinterested individuals. In the instant case, TOURON challenges the arbitrator as someone that was incompetent and thus could never afford him the protection to which he would have and should have been entitled. Metropolitan Dade County did not

follow its own procedures and policies and written standard operating procedures and law to which they were bound.[2]

METRO-DADE argues the law regarding res judicata insofar as claims previously raised are concerned. However, this case does not involve claims previously made. This is not a case about a contract dispute which was previously heard in arbitration. This is a case about a civil rights violation, one which has not been heard at any level and could not properly be before a court of competent jurisdiction until it was properly before the lower court.

CONCLUSION

The Eleventh Circuit, in affirming the District Court's order, per curiam, has not given its own decisions precedence and has created conflict within its own circuit as well as with other circuits. It is error to enter summary judgment based upon the doctrine of res judicata when the action is grounded on a review of an arbitration where the

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[2]See, Cleveland Board of Education vs. Loudermill, 105 S.Ct. 1487 (1985). The County never provided TOURON with the pretermination hearing to which he was undoubtedly entitled and id not follow the Florida Rules of Civil Procedure as required by the CBA and § 2-47, Metropolitan Dade County Code. Nor did they provide an arbitrator that complied with the relevant sections of the CBA § 2-47, Metropolitan Dade County Code.

arbitrator and reviewing court had no jurisdiction to hear a violation of civil rights, thereby lacking subject matter jurisdiction. An arbitration award does not preclude a cause of action for violation of civil rights. To allow this judgment to stand would serve to deprive hundreds, if not thousands, of individuals of their civil rights. For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Jose M. Touron,
8037 Lake Drive
#103
Miami, Florida 33166-7702
(305) 599-3199

pro se.

No.:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Jose M. Touron,

Petitioner,

vs.

METROPOLITAN DADE COUNTY, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

		Pages
A.	On Petition for Rehearing and Suggestion(s) of Rehearing En Banc, Case No.: 93-5345, U.S. Circuit Court of Appeals, Eleventh Circuit,	1-2
B.	Memorandum Opinion and Order Granting Final Summary Judgment, Case No.: 91-1131-CIV-Highsmith, U.S. District Court, Southern District of Florida	3-13
C.	Opinion, Case No.: 89-296AP, In the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, Appellate Division	14
D.	Metropolitan Dade County Ordinance §2-47	15-19

E. Collective Bargaining Agreement between Metropolitan Dade County and the Dade County Police Benevolent Association 20-30

F. Report and Recommendations, Case No.: 32-341-0045-87-LM, Metropolitan Dade County Personnel Department and letter from Joaquin Avino, County Manager 31-57

G. Order, Case No.: 86-24040 CA (04), In the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida 58-61

H. Narcisse vs. Dade County, 20 Fla. Supp.2d 131 (Fla. 11th Jud. Cir. App. Div. 1986) 62-66

I. Berenguer vs. Metropolitan Dade County, 4 Fla. Supp.2d 137 (Fla. 11th Jud. Cir. App. Div. 1983). 67-70

J. American Arbitration Association's Record of Occupation for Phillip Pitruzzello, Arbitrator 71

FILED:
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

APR 26 1995

MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO.: 93-5345

JOSE M. TOURON, Plaintiff-Appellant,

Versus

METROPOLITAN DADE COUNTY,
JOAQUIN AVINO, County Manager,
ROBERT A. GINSBURG, County Attorney,
CAROL ANDERSON, Asst. County Attorney,
FRED TAYLOR, DONALD MATTHEWS, Major,
VICKI TODARO, Sergeant,
JESSE VARNELL, Sergeant,
ROBERT OTERO, Lieutenant,
AMERICAN ARBITRATION ASSOC.,
PHILIP PITRUZZELLO, Professor,
Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

S/ JUDGE HATCHETT
UNITED STATES CIRCUIT JUDGE

ORD42
(9/91)

91-1131.mo

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-1131 CIV HIGHSMITH

JOSE M. TOURON, JR.,

Plaintiff,

vs.

METROPOLITAN DADE COUNTY, et al.,
AMERICAN ARBITRATION ASSOCIATION,

Defendants.

_____/

MEMORANDUM OPINION AND
ORDER GRANTING FINAL SUMMARY JUDGMENT

THIS MATTER is before this court on Defendant's Motion for Summary Judgment. This court has reviewed the motion, the Memorandum supporting same, the Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, Defendant's Reply and all the materials attached as well as the court file in this cause. For the reasons that follow, defendant's Motion for Summary Judgment be and the same is hereby **GRANTED.**

FACTS

The relevant facts (which are uncontroverted) are as follows:

1. Plaintiff received notice of charges made against him in a disciplinary action report dated January 6, 1987. Plaintiff responded. In that response plaintiff raised the issue of the charges against him being "unconstitutionally vague", that he had been subject to illegal interrogation, and was being denied due process.

2. Plaintiff was notified of his dismissal in a letter dated May 27, 1987. He then exercised his appellate rights.

3. A hearing examiner was appointed by the American Arbitration Association, pursuant to an agreement with the county. It is important to note that the role of the American Arbitration Association was only in the appointment of a hearing examiner, and the hearing was conducted pursuant to applicable sections of the county code.

4. The hearing examiner's report, which is uncontroverted in the record, indicates:

A. That plaintiff was represented by counsel. Plaintiff's counsel raised the issue that the hearing examiner should

disqualify himself because he was not an attorney but that motion was denied.

B. That discovery took place and that the plaintiff had access to personnel files and disciplinary records.

C. That the county called 13 witnesses and the appellant (plaintiff herein) called 6. Numerous exhibits were submitted.

D. That while the county submitted sworn statements of several witnesses, those witnesses were produced and the plaintiff had an opportunity for cross examination.

E. That the hearing examiner made it a point to note that the county made a good faith attempt to comply with the appellant's (plaintiff herein) requests for discovery and production of witnesses.

5. The hearing examiner recommended that plaintiff's request for reinstatement be denied, and that recommendation, following the appellate process to the office of the county manager, was followed in a letter to the plaintiff dated October 24, 1989.

6. Plaintiff thereafter filed a Notice of Appeal in the

Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida.

7. Plaintiff's appellate brief raised, in a violation of the procedural protection he was entitled to under the United States Constitution, lack of opportunity to cross examine and challenge evidence presented against him, Constitutional requirements of the lower administrative proceedings were violated, and numerous other lower administrative proceedings were violated, and numerous other arguments which are identical to those present in the instant case.

8. A three judge panel of the Circuit Court in the Eleventh Judicial Circuit affirmed the administrative decision in an opinion filed March 20, 1991.

DISCUSSION - SUMMARY JUDGMENT

A summary judgment is only proper if the record before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). The movant for a summary judgment bears the initial burden of showing by reference to materials on file that there are no genuine issues of material fact to be decided at trial. When that

burden is met, the burden shifts to the non-movant to demonstrate that there is a material issue of fact which would preclude a summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991).

In evaluating whether a party has met this burden, the court should resolve all reasonable doubts about the facts in favor of the non-movant, and draw all reasonable inferences in its favor. U.S. v. Four Parcels of Real Property, 941 F.2d 1428 (11th Cir. 1991); Joplin v. Bias, 631 F.2d 1235 (5th Cir. 1980). However, only disputes over facts that are relevant to the outcome of the lawsuit are proper to be considered to preclude the entry of Summary Judgment. Irrelevant disputes do not matter. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In other words the court must consider whether there are any genuine issues of material fact that must be submitted to a finder of fact because it is reasonable to conclude that they may be resolved in favor of either party. Id.

DISCUSSION - RES JUDICATA

The basis upon which defendant seeks Summary Judgment is the Doctrine of Res Judicata. "The general principle behind the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable as well as every actually litigated issue." See Albercht v. State, 444 So.2d 8, 11-12 (Fla. 1984). If the principle of res judicata applies, "the first judgment is conclusive as to all matters which were or could have been determined." Id. at 12.

For this principle to apply there must be: a final judgment on the merits, rendered by a court of competent jurisdiction, an identity of the parties or privity with the parties in the prior case, and the same cause of action involved in both. See e.g. Citibank, N.A. v. Data Lease Financial Corp., 904 F.2d 1498, 1501 (11th Cir. 1982) cert. denied 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 (1993).

While this was a state administrative/judicial proceeding, if the doctrine of res judicata applies, the federal court is to give the decision of the state court preclusive affect. See e.g. Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262

(1982). See also Sharpley v. Davis, 786 F.2d 1109 (11th Cir. 1986); Gorin v. Osborne, 756 F.2d 834 (11th Cir. 1985); Burney v. Polk Community College, 728 F.2d 1374 (11th Cir. 1984).

In reviewing the required elements, it is clear that the decision of the Eleventh Judicial Circuit in and for Dade County, Florida is a final judgment on the merits and it is a decision rendered by a court of competent jurisdiction.

While some of the parties named in the instant case were not parties in the previous case, privity is always required. The additional parties herein are simply additional county employees, all of whom acted in the course and scope of their employment and all of whom were involved in the previously contested administrative proceedings. Therefore the requirement of privity is present. See e.g. Citibank, supra. at 1503. Indeed, these additional defendants, while acting in the course and scope of their employment, may not be proper parties in this litigation, in any case. See e.g. Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989) cert. denied 495 U.S. 932, 1105 S.Ct. 2173, 109 L.Ed.2d 502 (1990); Willis v. Bell, 726 F.Supp. 1118 (N.D. Ill. 1989).

The final question is whether or not this action is, in affect, the same cause of action as that previously considered in the administrative/judicial process at the state level. The Eleventh Circuit has held that if a case arises out of the same operative facts or is based on the same factual predicate as a former claim, then the two cases are really the same for purposes of res judicata. Id. at 1503. It is important to note that in determining whether the causes of action are the same, the substance of the actions and not the form is the controlling factor. Id. See also Ray, supra. at 821.

Plaintiff, in attempting to oppose the Motion for Summary Judgment makes much of the fact that the original proceeding was an arbitration proceeding dealing with plaintiff's alleged violation of departmental rules and regulations whereas this suit involved violation of the plaintiff's constitutional rights. However, as previously noted, not only were these very same constitutional rights raised in the appeal at the state court level, but even if they were not, but could have been, the preclusive affect of res judicata applies. The doctrine bars not only the filing of claims which were raised n the previous proceeding, but bars claims that could have been raised. See e.g. Citibank, supra. at

1501. Furthermore, while it is true that a private arbitration decision is not binding on a subsequent federal court claim (see Alexander v. Gardner-Denver, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), it is not the administrative proceedings that preclude this federal action but rather the subsequent state court review. See e.g. Sharpley, supra. at 1112; Burney, supra. at 1380.

Plaintiff has also raised, as an issue, the fact that the arbitrator (who in this case was not actually an arbitrator but rather a hearing officer) was not a lawyer. The Eleventh Circuit has rejected that as a basis for distinction. See Burney, supra.

Plaintiff additionally challenges the constitutionality of the proceeding, itself. The plaintiff raises the fact that, essentially, he did not have the same rights to subpoena witnesses and for discovery as there would have been in full blown litigation. However, that is not the test. The test is whether the party against whom the state decision was rendered had a full and fair opportunity to litigate the issue. See Kremer, supra. As the Supreme Court noted, "state proceedings need do no more than satisfy the minimum procedural requirements of Fourteenth Amendment's Due Process Clause in order to qualify for

the full faith in credit guaranteed by federal law." Id. at 481. There is no special guideline or single model of the procedure that must be followed. The Supreme Court, in Kremer, stated that even though the claimant proceeds informally, if he has had an opportunity to present his claim including the right to submit exhibits and testimony of witnesses, to rebut evidence, and to have an attorney assist him (all of which occurred in the instant case), this would satisfy the requirement. Most importantly, judicial review was available to assure a claimant that his constitutional rights were not violated.

Plaintiff strongly argues that the constitutional issues raised in the instant case were not presented to the arbitrator. That, however, is not the issue. They clearly were presented to the appellate court, and argued at length.

Accordingly, pursuant to the case law cited, the decision of the Eleventh Judicial circuit in and for Dade County, Florida, affirming the administrative process below has preclusive affect and mandates the granting of defendant's Motion for Summary Judgment herein, on the basis of res judicata.

Accordingly, Summary Final Judgment is hereby entered in

favor of the defendants herein, and the plaintiff shall take nothing from this action.

DONE AND ORDERED this 27th day of October, 1993, at Miami, Florida.

S/ STEPHEN T. BROWN
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Shelby Highsmith
Jose M. Touron, Pro se
Elizabeth J. duFresne, Esq.
Carol Anderson, Esq.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

JOSE TOURON, **APPELLATE DIVISION**

Appellant,

vs.

DADE COUNTY (POLICE DEPT). CASE NO 89-296AP

Appellee.

Opinion filed March 20, 1991

An Appeal from OFFICE OF THE COUNTY MANAGER for Dade County, Florida.

STUART A. ROSENFELDT, ESQ., for appellant.

ROBERT A. GINSBURG, COUNTY ATTORNEY, CAROL ANDERSON, ASSISTANT COUNTY ATTORNEY, for appellee

Before GOLDMAN, GREENBALM and RAMIREZ, JJ.

PER CURIAM.
Affirmed.

RECORDED
APR 03 1991
CLERK OF CIRCUIT & COUNTY COURTS
[OFF REC'BK]

COPIES FURNISHED TO COUNSEL OF RECORD AND TO ANY PARTY NOT REPRESENTED

14964pg2686 PCA:11/90

103, § 1, 11-2-76; Ord. No. 81-65, § 1, 6-2-81; Ord. No. 82-35, § 1, 5-4-82; Ord. No. 84-55, § 1, 6-19-84; Ord. No. 86-33, § 1, 5-6-86)
Annotations-AO's 7-13, 7-14; AO of 12-15-87; CAO 82-30.

Sec. 2-43. Use of County buildings for examinations, etc.

All officers and employees of the County shall allow the Personnel Department any reasonable use of public buildings under their control, and furnish heat, light and furniture, for any examination, hearing or investigation authorized by this division.
(Ch. 30255, § 9, Laws 1955)

Sec. 2-44. Compliance by County personnel; furnishing data.

All officers and employees of the County shall comply with and aid in all proper ways in carrying out the provisions of this division and the rules, regulations and orders thereunder. All officers and employees shall furnish any records or information which the Director or the Personnel Advisory Board may request for any purpose of this division.
(Ch. 30255, § Laws 1995; Ord. No. 57-16, § 1, 10-7-57)

Sec. 2-45. Reserved.

Editor's note - Section 2-45, pertaining to the merger of conditional employees into the classified service by Oct. 1, 1974, has been deleted as obsolete. The section was derived from Ord. No. 77-86, § 3, adopted Dec. 6, 1977 and Ord. No. 84-63, § 2, adopted July 17, 1984.

Sec. 2-46. Certification of payrolls.

(a) No elected official shall make or approve or take any part in making or approving any payment for personal service to any person

holding a position in the County classified service unless the payroll bears the certification of the Director, or his authorized agent, that the persons named therein have been appointed and employed in accordance with the provisions of this law and the rules, regulations and order thereunder. The Director may for proper cause withhold certification from an entire payroll or from any specific item or items thereon. The Director may, however, provide that certification of payrolls may be made once every six (6) months, and such certification shall remain in effect except in the case of any officer or employee whose status has changed after the last certification of his payroll. In the latter case no payment of salary to such employee shall be made without further certification by the Director.

(b) Any person appointed or employed in wilful contravention of any provision of this law or of any rule, regulation or order thereunder who performs service for which he is not paid, may maintain an action against the person or person who purported so to appoint or employ him to recover the agreed pay for such services, or the reasonable value thereof, if no pay is agreed upon. No officer shall be reimbursed by the County or out of monies of his office at any time for any sum paid to such person on account of such services.

(c) If the Director wrongfully withholds certification of the pay of an employee, such employee may maintain a proceeding in the courts to compel the Director to certify such payroll.
(Ch. 30255, § 12, Laws 1955)

Sec. 2-47. Suspension, dismissal, reduction in grade and appeals.

Any employee may be suspended or reduced in grade or dismissed by the head of his department or designee thereof as approved in the manner provided for in an administrative order for any cause which will promote the efficiency of the service. In the case of dismissal or suspensions of five (5) or more consecutive days, prior to taking such action, the department head or approved designee may consult with the Personnel Director, unless such emergency conditions exist as would preclude such prior consultation. A written statement of the reasons for

the action shall be furnished to every permanent employee suspended, reduced in grade, or dismissed. A probationary employee shall not, as a matter of right, be entitled to appeal the action taken. Any employee who has completed the probationary period may appeal the action to a hearing examiner within fourteen (14) days by requesting the same in writing of the Personnel Director. Such hearing examiner shall be assigned by the Personnel Director from:

(a) A list supplied by the American Arbitration Association; or

(b) A list of private attorneys, approved from time to time by the Board of County Commissioners, who have practiced not less than five (5) years and who have received a rating from a national rating service for attorneys.

Such hearing examiners may be paid a fee for their services but shall not be deemed County officers or employees within the purview of Sections 2-10.2, 2-11.1 or otherwise. The hearing examiner shall conduct a hearing after notice upon the charges and shall transmit his findings of facts, conclusions, and any recommendations together with a transcript of all evidence taken before him who may sustain, reverse or modify the suspension, reduction in grade, or the dismissal. Such hearings shall be conducted insofar as is practicable in accordance with the rules of civil procedure governing the procedure in the Circuit Court, except as may be provided in this Code or by rules adopted by the Board of County Commissioners. Any interested party may procure the attendance of witnesses and the production of records at such hearings in the manner provided by Section 2-50. Any person appearing before a hearing examiner under the provisions of this section has the right, at his own expense, to be accompanied, represented and advised by counsel or other qualified representative. (Counsel shall mean a member of the Florida Bar). If a person is not represented by counsel or does not appear on his own behalf, but is desirous of representation by a qualified representative, the hearing examiner shall make diligent inquiry of the prospective representative, under oath and on the record, prior to commencing the hearing to assure that the prospective representative is qualified to appear in the

hearing and capable of representing the rights of the person.

All hearings requested pursuant to this section shall be commenced within sixty (60) days from the time the notice of appeal is received by the Personnel Director unless the employee requests additional time to prepare his appeal or requests that the hearing be continued pending the outcome of a related criminal proceeding, or requests additional time for other good reason. In the event a properly requested hearing is not commenced timely, the dismissed employee shall be entitled to temporary reinstatement until such time as a hearing is commenced. The County Manager shall reach his decision within thirty (30) days from the receipt of the hearing examiner's recommendations. In the event the County Manager does not reach a decision within thirty (30) days of receipt of the hearing examiner's recommendations, the dismissed employee shall be entitled to temporary reinstatement until such time as the decision by the County Manager is reached. However, at all times requirements of this section may be waived by mutual agreement between the dismissed employee and the County. This section shall also apply to exempt employees when required by the terms of a collective bargaining agreement or as approved in an administrative order.

(Ch. 30255, § 13, Laws 1995; Ord. No. 57-16, § 1, 10-7-57; Ord. No. 58-11, § 1, 4-16-58; Ord. No. 65-18, § 1, 3-16-65; Ord. No. 68-63, § 1, 11-5-68; Ord. No. 70-49, § 5, 6-16-70; Ord. No. 73-35, §1, 4-3-73; Ord. No. 75-102, § 3, 11-4-75; Ord. No. 76-43, § 1, 5-4-76; Ord. No. 77-15, § 1, 3-1-77; Ord. No. 78-64, § 1, 10-4-78; Ord. No. 83-100, § 1, 11-1-83; Ord. No. 84-55, § 2, 6-19-84)

Annotation-AO 7-16.

Sec. 2-47.1. Review of County Manager's decision in personnel disciplinary actions.

The County Manager's decision shall be subject to review in accordance with Florida Appellate Rules. For purposes of such review, any original jurisdiction notices required to be filed under the Florida Appellate Rules, shall be filed with the Personnel Director of Metropolitan Dade County. The Personnel Department shall provide

the index and record on appeal when required by and in accordance with the Florida Appellate Rules. A fee may be charged by the Personnel Department for the preparation and transmission of the record on appeal to the Circuit Court. Such fees shall not exceed the amount charged from time to time by the Clerk of the Circuit Court for similar services.

(Ord. No. 78-64, § 2, 10-4-78)

Editor's note-Ord. No. 78-64, § 2, adopted Oct. 4, 1978, amended the Code by adding provisions designated as § 2-47A; in order to preserve Code format, the editor has redesignated said provisions § 2-47.1.

COLLECTIVE BARGAINING AGREEMENT

BETWEEN

METROPOLITAN DADE COUNTY, FLORIDA

AND

THE DADE COUNTY POLICE

BENEVOLENT ASSOCIATION

OCTOBER 1, 1985 TO SEPTEMBER 30, 1988

ARTICLE 9. RIGHTS OF EMPLOYEES IN DEPARTMENTAL DISCIPLINARY MATTERS.

A. Rights of employees at hearings before a Departmental Review Panel or subject to a departmental disciplinary investigation:

1. The Internal Review Section or departmental disciplinary investigator will keep employees informed as to the nature of the investigation when they are questioned or interviewed concerning a complaint or allegation and to inform them if they are the subject of the investigation or a witness prior to any interview. Employees who are subjects of the investigation will be informed prior to the interview that they have the right to have legal counsel or a representative present. Said employee shall be notified of each and every allegation or charge made against him and shall be given a copy of any and all complaints and statements of the complainant made against him, if available, prior to any interviewing of said employee.

2. Interviews and questioning of employees shall be conducted in a professional manner. Statements shall not be taken in a coercive manner.

3. Administrative statements made by employees shall not be made public without written permission of said employee except where covered by the Public Records Law. An employee required to make an administrative statement shall be given advance notice in order to arrange proper representation and legal assistance.

4. Any employee who is summoned before a Departmental Review Panel, Departmental Investigation or Internal Review Section, during his normal off-duty hours will be compensated at the rate of time and one half for those hours. Employees so summoned will be governed by Article 25 entitled, Call Back, Court Time, and Special Emergencies.

5. The County agrees to promptly furnish any employee with two (2) copies of any disciplinary

action report against him prior to disciplinary action being taken against him.

6. The employee shall, upon request, receive a copy of his written or recorded statement at no cost to the employee.

7. The employee who is the subject of a complaint or allegation shall be notified in writing of the disposition upon the conclusion of the investigation, and final decision by the Department Director.

8. In cases where management chooses to relieve an employee from duty pending an investigation or other administrative action, the following conditions will prevail:

a. The employee will remain on full salary allowances and shall not lose any benefits during this period of time.

b. Should disciplinary action result from the investigation, that period of

time in which the employee was relieved from duty without pay may be included in the disciplinary action.

9. Except where covered by law when an employee has been arrested or indicted or charged by a prosecuting official, the Department on its own initiative shall not release a photograph or home address of any employee under investigation without the employee's written permission and the approval of the County Manager.

10. Any employee who is the subject of an internal investigation or department review panel will, in cases where findings or charges are not sustained, exonerated, or unfounded or who is exonerated through the disciplinary appeal process, have the right to have all documents and reports, excluding the County "Advise of Personnel Action" forms, purged from all personnel files maintained by the Departments.

11. No employee shall be required to submit to any device designated to measure the truthfulness of his responses during questioning.

12. The County retains the right to inspect and search issued property and equipment and all County property. Upon request, employees will be given the reason for such search. Personal property and equipment will not be searched except pursuant to law.

13. No employee shall be disciplined except for just and proper cause.

B. Hearing pursuant to the Hearing Examiner System:

1. The law enforcement officer subjected to the disciplinary process shall be informed in writing of the charges against him/her. The officer or his counsel shall have the right to confront and question all witnesses under oath. He shall have the right of discovery and other procedural rights in accordance with the Florida Rules of Civil Procedure.

2. Any charges against an officer must be specific and clearly drawn and a violation of law, County rules, and regulations, and/or Departmental rules, regulations and orders. No vague or ambiguous language such as "conduct unbecoming an employee" shall be used unless supported by specific incidents or charges.

3. The decision of a hearing examiner shall include a findings of facts, conclusions and may include recommendations, a copy of which shall be immediately provided to the employee concerned.

a. The parties agree that Section 2-47 of the Code of Metropolitan Dade County will be the exclusive method of disciplinary appeal for all Dade County employees exclusive of appeals to the judicial system.

b. The County Manager will make his decision based entirely on the facts contained in the Hearing Examiner's

findings of facts and the transcript of the proceedings.

c. The County will continue to make good faith efforts to obtain the Hearing Examiner's decision within 30 days of the Examiner's receipt of the transcript.

The Hearing Examiner shall submit his/her findings of fact within 60 days of receipt of transcript of the hearing. The County Manager shall have 30 days from receipt of the findings to render his decision.

In the case of a dismissal, failure of the County Manager to provide an employee with a timely decision will result in the employee having the right to request temporary reinstatement to pay status pending receipt of a final decision.

d. The Metro-Dade Police Department and the Department of Corrections and Rehabilitation agree not to prejudice an employee from promotional or transfer opportunities based on a disciplinary action of suspension under appeal.

4. All disciplinary actions including demotions, suspensions, and dismissals of permanent employees, but excluding reprimands and lesser disciplinary actions, shall be appealable to a hearing examiner, in accordance with the applicable Section(s) of the Metropolitan Dade County Code. This section shall not apply to termination of non-permanent or probationary employees or the demotion of permanent employees who fail to complete promotional probationary period to the satisfaction of the Departments for other than disciplinary reasons.

5. The above referenced Code provisions providing

for a disciplinary appeal process are to be read to include the following procedural guarantees:

a. The County Personnel Division Director shall establish and make available to the Association a panel of qualified Hearing Examiners to be selected from local attorneys who preferably should be experienced in matters regarding employee relations, disciplinary cases, governmental law or administrative matters. The Association may challenge for cause, the inclusion of specific attorneys on the panel.

b. The County shall publish and establish a Hearing Examiner Procedure Manual. Such Manual shall be reviewed by the County and the

P.B.A. within 90 days of the signing of this agreement for possible revision and modification.

c. The Personnel Division Director shall be responsible for selecting the Hearing Examiner on each appeal and setting the date, time and place for the hearing upon consultation with the parties involved. There shall be no ex parte communication between the participants of the hearing and the Examiner.

d. The parties to the hearing shall not initiate ex parte communications with the County Manager's Office for the purpose of influencing the final appeal decision. This decision shall be based solely on the hearing record.

METROPOLITAN DADE COUNTY

PERSONNEL DEPARTMENT

In the Matter between

METROPOLITAN DADE COUNTY

Report and Recommendations

-and-

Case No.
32-341-0045-87-LM

JOSE TOURON,
METRO DADE POLICE DEPARTMENT

Before Philip Pitruzzello, Hearing Officer

APPEARANCES

For Metropolitan Dade:

CAROL ANDERSON, Esq.
Assistant County Attorney

JOSE TOURON, Appellant

DONALD H. MATTHEWS, Major, Commander of Miami Lakes

MARK MITROS, Supervisor of Landside Operations, Dade County Aviation Department

DAVID LEVINE, Dade County Aviation Department

KENNY ROSARIO, Metro Dade Police Department, Detective

JESSE VARNELL, Sargeant - General Investigation Unit

ROBERT BURFIELD, Detective Sargeant, Metro Dade Police

PAUL OHANESIAN, Homicide Bureau, Metro Dade Police

VICKI TODARO, Lieutenant, Investigator Internal Review

EDWARD RUFF, Supervisor, Sargeant Metro Dade Police

ROBERT GANGWISH, Executive Officer, Fiscal Management Bureau, Discipline Coordinator, Metro Dade Police

FRED TAYLOR, Director of the Metro Dade Police

For the Employee:

JEROME VENTURA, ESQ., Attorney

WILLIAM HANLON, Administrative Officer, Metro Dade Police

PATRICIA ROSENFELD, Former Police Officer, Metro Dade Police

ED HAFNER, Police Sargeant, Metro Dade Police

MARIO BEOVIDES, Former President of the Hispanic Officers Association

LAZARO PAZ, Police Officer, Metro Dade Police

HAROLD RUFFNER, Police Officer, Metro Dade Police

Also Present:

LT. SAM DUNCAN, Metro Dade Police

DR. DAVID ROTHENBERG, Clinical Psychologist

THE HEARING

The hearing dates were as follows:

January 18, 1989,	9:30 AM - 11:30 AM
May 24, 1989,	9:30 AM - 5:30 PM
May 25, 1989,	9:30 AM - 5:25 PM
May 26, 1989,	9:30 AM - 2:15 PM
June 14, 1989,	9:30 AM - 6:10 PM
June 15, 1989,	9:30 AM - 4:00 PM

Pursuant to notice, all meetings were held in a conference room made available at the Metro Dade Center 111 N.W. 1st. Street, Miami, Florida. Both parties estimated that two (2) possibly three (3) days of hearing would be necessary. A number of intervening factors extended the hearing to six (6) days. On January 18th, the hearing was convened. Both parties were present. However the city of Miami was experiencing civil disturbances and the entire police department was placed on an emergency mobilization - 12 hour shifts. It meant that most of the witnesses scheduled to appear and testify would not be

available.

The Hearing Examiner and the respective attorneys agreed to make the best use of time and then adjourn. A number of housekeeping matters were discussed and agreed upon. More importantly the parties developed several understandings and stipulations which proved helpful in expediting the hearing when it was reconvened on the date(s) indicated. A number of motions were also presented for a ruling.

- Mr. Ventura, attorney for Mr. Touron, asked that the Hearing Examiner disqualify himself because: (1) he was not an attorney and (2) he lacked experience in the subject matter of the appeal. The motion was denied on the grounds that the Hearing Examiner was appointed in accordance with Section 2-47 of the Code of Metropolitan Dade County as amended by Ordinance No. 83100 and secondly because the arbitrator, having dealt with many police cases, was thoroughly familiar with the subject matter. He

offered to and subsequently did provide a list of police matters he had dealt with.

- Mr. Ventura introduced a motion in limine asking that the introduction of certain tapes be disallowed. His motion was sustained and the County stipulated that the tapes would not be placed in evidence.
- Mr. Ventura presented a motion to compel depositions. The County was asked to make available some thirty-eight (38) individuals as witnesses. It was stipulated that the County would make available all those who were still under County control.
- Mr. Ventura was concerned with discovery and access to the personnel files and disciplinary action records. It was agreed that the County would comply with all reasonable requests.
- The County stipulated that it would present its case and justify its actions based on the incident(s) of May, 1986. It would not develop a case based on progressive discipline.

- Mr. Ventura moved that the Hearing Examiner, forthwith, issue a return to pay - status order. The motion was denied. The issue would be dealt with in the report prepared after the hearing.

A series of unavoidable delays occurred. The three day hearing set for January 18-20 was adjourning early on the 18th because of the emergency mobilization of the police force. The March 27-29 hearing dates were cancelled to accommodate legitimate personal needs of key participants. Both parties demonstrated a genuine desire to complete the hearing by revising their calendars and scheduling five (5) days in a three week period - not a small accomplishment for extremely busy people.

ISSUES

The County charged that on May 8, 1986 and shortly thereafter incidents took place which in and of themselves, merited the termination of Officer Jose Touron. Specifically he was found to have violated the departmental rules listed below:

2.200.07 OBEDIENCE TO LAWS AND RULES

Employees shall comply with federal and state laws; county ordinances, rules and procedures; and departmental policies, rules, orders and procedures.

2.200.57 COMPROMISING POLICE CASES

2.200.59 ASSISTING CRIMINALS

2.200.67 INTERNAL INVESTIGATIONS

2.200.20 DIVULGING INTERNAL INFORMATION

On May 29, 1987 Officer Touron was terminated on order of the Director, Fred Taylor.

Mr. Touron denied the charges. He claimed that he had been singled out for disciplinary action for totally unrelated reasons - namely - (1) his aggressive investigations and reports of customs violations, terrorists activities, corruption and criminal acts at the airport and the Port of Miami, and (2) his leadership in the development of a class action suit regarding the County's failure to correct carbon monoxide levels at the airport. He asked that he be reinstated and that he be awarded full back pay and all benefits which he had been denied from the date of termination to present.

TESTIMONY

The County called thirteen (13) witnesses; the appellant called six (6). Together the parties submitted more than sixty exhibits identified and entered seriatim (see transcript). Each ranged from one (1) page to ninety nine (99) pages. The transcript alone was in excess of fifteen hundred (1500) pages. The hearing, estimated to require three (3) days actually extended to six (6) days and would have been longer had it not been abruptly ended upon request of the appellant.

The County stated that upon advice of the State Attorney's office, it opted to forego criminal charges where the burden of proof as to such charges would have to meet the "beyond a reasonable doubt test". That office also advised that there were grounds for pressing charges of violations of departmental rules and regulations.

The County stated that it would establish that Jose Touron violated departmental rules as specified in the Disciplinary Action Report. It stipulated that it would present its case with the premise that, in and of themselves, the violations were so serious and so unbecoming a law enforcement officer as to warrant the action that it took.

The County alleges that Mr. Touron informed one David Levine, an aviation employee, that he was under investigation for selling narcotics. Mr. Touron learned this from detective Vergara who mentioned if to Mr. Touron while discussing another matter. David Levine reported the incident to his supervisor and inquired about the matter with union officials but did not reveal the name of the police officer. One of his supervisors, Mark Mitros, put him in touch with Sargent Varnell who met with him and then accompanied him to Internal Review. He gave a statement and ultimately revealed that the officer who had warned him about the investigation was Jose Touron. He also agreed to wear an electronic recording device.

Mr. Levine testified that he had indeed been advised of an investigation by Mr. Touron. Subsequently officer Touron told him not to identify him as the source. It would mean his job. He suggested that it would "blow over" but if not, just say that Levine had fabricated the story about an officer. He was to say instead, that it was a rumor which he heard at work. When David Levine discussed the pressure from Sargent Varnell to reveal the name of the officer and provide details, he alleges that Mr. Touron said that was harassment;

Levine should tape Sargent Varnell's calls.

Some of the conversations between Mr. Touron and David Levine occurred while the latter was wearing a recording device. Lt. Todaro who set up and monitored the tape recording testified "that Mr. Levine said Sgt. Varnell called and wanted to know the name of the officer that gave the information. That Mr. Touron said he (Levine) couldn't tell the name and do as I tell you". Lt. Todaro was in a van and could see the two conversing and personally heard the above conversation on the monitoring head set.

In keeping with a commitment to utilize best evidence whenever possible, the County submitted sworn statements by detective Vergara, David Levine, and in addition, produced the above individuals for direct and cross-examination. Lieutenant Todaro, who conducted the Internal Review investigation, was also called to testify by the County. Their sworn testimony corroborated and supported the County's version of the events which are the subject of this hearing.

Sargent Varnell and detective Pual Ohanesian were particularly direct and forthright in describing the incident and the implications and consequences of revealing information to a person under investigation.

They and other officers involved who testified expressed their concern for the safety of fellow officers and the chagrin over the waste of energy and time when the investigation had to be abandoned because the "cover was blown".

Sargent Varnell's testimony was completely consistent with that of David Levine and Lt. Todaro. He filed a complaint with Internal Review which resulted in an investigation as to the facts by Lt. Todaro (previously described).

The first witness called by the County was Jose Touron, the appellant. The County attorney, Carol Anderson, noted that she would not impair in any way his immunity of criminal charges. Given that Mr. Touron had a duty to appear as a witness.

Mr. Touron's testimony was largely confined to an explication of his duties particularly at the airport and a review of his sworn statement to Internal Review.

As to the former, the County attempted to show that Mr. Touron had been given specific and standard duties at the Port of Miami and at the Airport. But he was depicted as one who extended and even idealized his role as an investigative officer. As he testified

he felt that (quote from transcript) "investigations as a police officer and a deputy sheriff in the County of Dade, my primary responsibilities were to protect the people of Dade and my fellow workers of activities that I found against our country to be perpetrated by terrorists, ... and this information was related to District Commander who took no action". The County feels that since roles are institutionally defined rather than personally defined Mr. Touron aggrandized his role as an investigator. Further it feels that he was not in a position to know the disposition of his reports and therefore maligned his superiors when he stated "they did nothing" about customs violations and terrorists.

Mr. Touron's sworn statement to Internal Review consisted of ninty nine (99) pages (it should be noted that Mr. Touron's statement was admitted over the objection of his attorney, Jerome Ventura, who moved that it be suppressed on the grounds that it was coerced.)

The direct examination and cross-examination related to Mr. Touron's testimony produced over one hundred (100) pages of transcript. The Hearing Examiner took special care to alert all concerned that the questioning and testimony exclude hearsay and

remain closely relevant to the issues. The major thrust of the County's direct examination was to attempt to reconcile the discrepancies in testimony and statements made to Internal Review by various individuals and Mr. Touron. It was particularly concerned with both his sworn statement to Internal Review and his testimony at the hearing. It felt there was clear evidence of revealing confidential information concerning an investigation, of advising a civilian to tape conversations with a fellow officer and of encouraging and individual to falsify his testimony. It characterized Mr. Touron's testimony, in which he claimed he was speaking guardedly and secretively only because of his leadership in a carbon monoxide suit, as evasive and deliberately misleading.

The County countered arguments that Mr. Touron had reason to fear retaliation and loss of his job because of his activities in recruiting police and aviation employees for a class action suit, on several grounds. A number of witnesses including Major Matthews Director Taylor and others employed at the airport stated that it was commonly known that there was a problem of air pollution. The P.B.A. had been involved in a study. The media had given front page

attention to the airport air pollution problem. A number of suits had been field against the County on this matter. Both of the above individuals stated that it was an employee's right to file an action against the County. No discipline had ever been or would ever be imposed on an employee exercising his constitutional rights. The County had spent millions on improved ventilation and newspapers had publicized the matter. There simple was nothing secret about air pollution at the airport.

In his defense Mr. Touron, through his attorney, denied categorically that he ever revealed to David Levine that he was the subject of a narcotics investigation. His only involvement was in "bringing David Levine in" at the request of detective Vergara. He characterized David Levine's and detective Vergara's sworn statements and testimony as self-serving and false. Furthermore, these statements to Internal Review were obtained under coercion and were, therefore, invalid.

Mr. Touron advance and argument. He was being punished unjustly because of this high standards for discharging his responsibilities. He may have become an embarrassment to his

superiors. Although somewhat indirectly relevant he expressed a belief that his reports of corruption in the department, customs violations, illegal transport of explosives and terrorist activities were not happily received and then not acted upon. He attributes his perceived role as a whistle blower as a major source of his problems and his ultimate termination.

A major contention of the appellant was that he was forced out of fear of being dismissed to mask his activities as the moving force behind a drive to recruit and enlist individuals at the airport in a suit to make the County accountable for air pollution and its harm to the health of the public and its employees.

His urgings not to identify "the officer who told you this", or "don't tell who because it will mean my job" had to do with the carbon monoxide suite, not the revelation of confidential information. The statements make to Internal Review by Levine, Vergara and others were all tainted because they were obtained under duress. Some individuals were informed that failure to give testimony was grounds for possible dismissal.

Mr. Touron made a passionate defense of his right to the police

officer position. Yes, his aggressive and meticulous approach to discharging his duties may have irritated his superiors. His unwillingness to look the other way may have made waves from time to time. But that was no reason to single Jose Touron out for special discipline. That, Mr. Touron claims, is exactly what happened in this matter. He would prove that several officers had received much lighter discipline for more serious infractions than did Officer Touron.

For example, William Hanlon a former police officer testified that he was reinstated to a position of administrative officer. While he would not give details on advice of attorney it appears that he may have been involved in a incident in which the use of force resulted in a death. A settlement of approximately $150,000 was negotiated - yet stated Mr. Touron, he is still employed.

Another witness testified that she was terminated because of involvement in a theft of narcotics and monies from the properties department, she was not reinstated.

The Hearing Examiner was informed that more witnesses would be presented (perhaps as many as twenty (20) - all in an effort to prove that even if Jose Touron were found to have violated

administrative rules, arquendo, he was penalized to a degree far beyond that applied in comparable disciplinary actions.

On the last day of the hearing June 15 1989, it became apparent that all of the witnesses could not be heard that day. One option was to hear as many as possible and then adjourn to a later date. A second option was to recall Mr Gangwish, the department's discipline coordinator, who would review in detail the twelve (12) to fourteen (14) disciplinary cases previously identified as critical and roughly comparable to that of Mr. Touron by Jerome Ventura, his attorney.

A recess was granted in order to give the parties time to consider the options. When the hearing reconvened Mr. Ventura announced that he had been instructed by his client to rest his case. His witnesses waiting to testify could be released and no attempt to call other witnesses would be necessary. A number of exhibits would be submitted and then a closing statement.

The Hearing Examiner addressed Mr. Touron directly and asked if he understood fully the implications of his decision - the rights he, in effect, was waiving. Mr. Touron made a lengthy statement

defending his innocence and his dedication as a police officer. He repeated that he had done nothing wrong and that he had been unjustly punished. More than that he had been singled out for arbitrarily harsh punishment. Other people who were quilty of corruption and other illegal activities walk around free and unpunished. The Hearing Examiner had not placed him on a pay status as requested and as he legally is authorized to do. He will seek redress in a real court of law.

The Hearing Officer insisted that Mr. Touron consult with his attorney and a recess was called for that purpose.

Upon reconvening, Mr. Ventura stated that he had discussed the meaning of a decision to curtail the hearing with Mr. Touron. He felt that Mr. Touron understood the consequences of his decision. He asked that Mr. Touron corroborate that he, after advisement, made the decision of his own volition. He also asked that Mr. Touron be permitted to state his reasons for taking the action the he did. Mr. Touron verified that the decision was his and he repeated, again, the reasons for his decision.

A recess requested by the appellant was granted. The purpose was to prepare copies of documents and exhibits to be submitted.

There was no substantive discussion of the meaning of the exhibits submitted at this point (a procedure mutually agreed upon by the respective attorneys). They were simply entered with a statement as to their purpose. The Hearing Officer was asked to consider them in arriving at conclusions and recommendations in his report. Many of the submissions consisted, according to Mr. Ventura, of relevant and controlling case law on some aspect of the appellant's defense. An impressive documentation of Mr. Touron's extensive training, awards, and qualifications was also submitted. Consistent with the grave responsibility to assure a fair hearing to the appellant the Hearing Examiner faithfully examined an reexamined all of the exhibits submitted and particularly the cases which attorney Ventura submitted. Each case cited was analyzed for its relevance and for its applicability to the matter before the Hearing Examiner.

FINDINGS OF FACT

The Hearing Examiner read the transcript consisting of more than 1500 pages in its entirety. He re-read may segments a second and third time where telling testimony indicated such a need. The exhibits and, particularly, the sworn statements were given the same

attention. The cases introduced by the appellant were subjected to the methodology and canons of internal and external criticism. The findings of fact which follow are conclusions and findings which emerged after hard inquiry and analysis.

The County was prepared to review some 12 to 14 personal files and the actions which the appellant identified as comparable and similar to Mr. Touron's case. The County discipline coordinator was prepared to review each case in order to assist in determinating the consistency of treatment. At this point Mr. Touron announced his desire to close the hearing.

The preponderance of evidence supports the County's position that Mr. Touron disclosed to David Levine that he was being investigated for selling narcotics. David Levine admitted this to Sargent Varnell who filed a complaint with Internal Review. During this investigation by Internal Review sworn statements and testimony by detective Vergara, David Levine, Lt. Todaro, and direct testimony of several other witnesses, established that Mr. Touron not only divulged confidential information but that he also urged David Levine not to tell the truth about the matter - "it would mean his job".

Mr. Touron's contention is that these conversation were misconstrued. His referenced to "don't tell them the officer's name" "it will mean my job" actually referred to his covert leadership in the carbon monoxide suit. His creditability regarding this pales when one reads the entire transcript, the exhibits and considers the weight of evidence.

Mr. Touron claims that the real motives behind his termination were his commitment to investigate all illegal activities no matter how controversial. He reported these activities to his supervisors and nothing was done. No substantial evidence was presented at the hearing supporting charges such as an anti-Touron bias or that nothing was done.

Mr. Touron admitted at lest once, under oath, that he advised David Levine to tape telephone conversations with Sargent Varnell who was in the process of investigating the "leak" which had occurred. He stated that he had been told by a superior, a Sargent Erwin, that this was legal. Sargent Erwin is deceased.

Mr. Touron objected to the admission at the hearing of sworn statements by David Levine and detective Vergara and, on the grounds

of self incrimination and coercion, his own statement to Internal Review. David Levine volunteered his statements and was not under any obligation to testify nor could he be fired for not doing so. Mr. Touron was granted immunity from any criminal charges stemming from the interrogation by Internal Review. His attorney was present and it appears from the transcript participated more than usual in the proceedings, given immunity self incrimination is not involved and no evidence of coercion was advanced.

The County made a good faith attempt to comply with the appellants requests re: discovery and production of witnesses. On one occasion several boxes of personnel files were brought to the hearing for the appellant's perusal and analysis. A number of documents were forwarded by the county at mr. Ventura's request.

RECOMMENDATIONS

The County terminated Mr. Touron.

Mr. Touron made a mistake - a very serious mistake - and its gravity is unmistakable. His request for reinstatement and for back pay and benefits, such as back sick leave and vacation days, should be denied. That is consistent with the County practice in such matters.

Mr. Touron is a highly trained officer with much to offer the Metro-Dade Police department. He has dedicated himself to a career in law enforcement. He has a property interest in his position which cannot be dismissed lightly.

It might appear attractive to consider that the loss of pay and benefits for more than year and a half and the inability to find employment was enough to square things. Let bygones be bygones and as a quid pro quo let us reinstate Jose Touron. But that would be to reinforce Mr. Touron's less than realistic mind set and invite a repetition of another serious mistake.

Mr. Touron is an individual who has a commendable commitment and pride in his chose profession. But he is highly alienated both toward many of his superiors and toward the Department as an organization or a system. In addition, faced with overwhelming evidence that he violated departmental rules, he believes he did nothing wrong.

The recommendation is that Mr. Touron be reemployed(Note: on original "re" is crossed out by hand) as distinguished from reinstated under the following conditions:

Mr. Touron must demonstrate that he can manifest his individuality within the role expectations defined for his position by the County. This includes an acknowledgement that the entire department is committed to uphold the law, that the rules and regulations are written to achieve that end and that the superiors in the chain of command are there to assist all subordinates in achieving that end. Within that, dedicated and committed officers are the hope for improving service.

Mr. Touron should review carefully all of the evidence, testimony, exhibits and other data available regarding this incident. He should be able to discern that he made a serious mistake though his motives might have been the purest (nowhere in this whole proceeding was there even a faint suggestion that the appellant acted of greed or a desire for personal gain).

It is recommended therefore:

- That Mr. Touron request for reinstatement be denied.
- That Mr. Touron's request for back pay and benefits be denied.
- That Mr. Touron be offered employment as a police officer, as distinguished(Note: on original, "from" is inserted hand written) reinstatement, under the following conditions:
- He must demonstrate a belief that his superiors are working to

make a good officer a better officer.

- He must acknowledge that, in terms the norms of the profession he has chosen, he made a serious mistake. He breached the standards of acceptable behavior and he violated departmental rules and regulations.
- He must be deemed fit for the position of police officer. (The usual standards for fitness should be applied).
- He must serve the usual probationary period of new employees.
- Mr. Touron must meet all of the conditions cited above. Should he meet all of the above except fitness for the position of police officer, he should be offered employment in a classification for which he is fit and in which his extensive background and talents can be ut ized in the improvement of county service.

Respectfully submitted,

S/PHILIP PITRUZZELLO
Philip Pitruzzello
Hearing Examiner

August 10, 1989

SEAL: METROPOLITAN DADE COUNTY, FLORIDA SEAL:

METRO-DADE CENTER

OFFICE OF COUNTY MANAGER
SUITE 2910
111 N.W. 1st STREET
MIAMI, FLORIDA 33128-1994
(305) 375-5311

October 24, 1989

Mr. Jose Touron
c/o Mr. Jerome Ventura, Esquire
4030-C Sheridan Street
Hollywood, Florida 33021

Dear Mr. Touron:

I have received the findings and recommendations of the Hearing Examiner in the matter of your appeal of the action taken by the Metro-Dade Police Department in dismissing you from their service. A copy has been sent to your attorney.

On the basis of the Hearing Examiner's findings and recommendations and the entire record from the appeal hearing, including the transcript, I am hereby denying your request for reinstatement, back pay and benefits. Therefore, I am upholding the decision of the department and confirming your dismissal from County service.

Additionally, the Hearing Examiner recommended that the County re-employ you in some appropriate classification. I disagree with his opinion on that point. Based on a careful reading of the hearing record, I believe it would not be in the County's best interest to offer

you employment at this time.

Sincerely,

S/JOAQUIN G. AVINO
Joaquin G. Avino, P.C., P.L.S.
County Manager

cc: Robert A. Ginsburg
County Attorney
Carol Anderson
Assistant County Attorney
Aristides Rivera, P.E., P.L.S.
Executive Assistant to the County Manager
Fred Taylor, Director
Metro-Dade Police Department
Philip Pitruzzello, Hearing Examiner
Jerome Ventura, Esquire

CERTIFIED NO. P 524 128 280

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CASE NO.: 86-24040-04

JOSE M. TOURON,

Plaintiff,

vs.

METRO-DADE POLICE DEPARTMENT and DONALD MATHEWS,

Defendants.
_____/

RECORDED APR 27 1988 RICHARD P. BRINKER CLERK

ORDER

THIS CAUSE having come on to be heard on Plaintiff's Motion to set aside default judgment before the Honorable Mary Ann MacKenzie on April 14, 1988 and the Court having heard argument of consel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED

1. That said Motion be, and the same is hereby DENIED.

2. The Plaintiff has not exhausted his administrative procedures and remedies provided by Metropolitan Dade County's

Code, Rules and Administrative Orders.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 22 day of April, 1988.

S/MARY ANN MACKENZIE
Circuit Judge

cc:
Jerome P. Ventura, Esq.
4030-C Sheridan Street
Hollywood, Fl. 33021

Carol Anderson, Esq.
Assistant County Attorney
Metro Dade Center
111 N.W. 1st Street, Suite 2810
Miami, Fl. 33128-1993

OFF. 13657PG1295
REC.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CASE No.: 86-24040 (04)
(on original, # hand written)

JOSE M. TOURON,

Plaintiff,

vs.

METRO-DADE POLICE DEPARTMENT AND DONALD MATTHEWS,

Defendants.

(on original, style hand written)

ORDER

THIS CAUSE having come on to be heard on Defendant's/Plaintiff's Motion (on original, the following are hand written notes) to set aside default judgment before the Honorable Mary Ann MacKenzie in her on April 14, 1988

and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED (on original, the following are scratched out by pen:) that said Motion be, and the same is hereby

denied.

1. (on original, the following are hand written:)That said Motion be, and the same is hereby denied

2. The Plaintiff has not exhausted his administrative procedures and remedies provided by Metropolitan Dade County's Code, rules and administrative Orders.(on original, the following were scratched out by pen: parties will continue to pursue administrative procedure.)

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 22 day of April, 1988.

STAMP/S/ JUDGE MARY ANN MacKENZIE
Circuit Judge

Copies furnished:

NARCISSE v DADE COUNTY

20 Fla Supp 2d 131

NARCISSE v METROPOLITAN DADE COUNTY

Case No. 85-318 AP

Eleventh Judicial Circuit, Appellate Division, Dade County

October 14, 1986

HEADNOTE

Classified to Florida Supplement Digest

Administrative Law §97; Appellate Review §§ 417, 761.5; Counties § 46 -- appellate review of administrative decision -- competency of evidence considered by administrative officer

Reviewing a county manager's decision that a police officer's accident was preventable, the court held that the decision was not based on substantial, competent evidence where the record reviewed contained testimony that amounted to opinions and conjecture derived from second-hand information.

An administrative appeal from a decision by the Dade County Manager's Office.

APPEARANCES OF COUNSEL

Denis Dean for appellant.

Robert A. Ginsburg, County Attorney, and **Carol A. Anderson**, Assistant County Attorney, for appellee.

Before **HENDERSON, SALMON, MASTOS, JJ.**

OPINION OF THE COURT

MICHAEL H. SALMON, Judge.

This is an appeal by Metro Dade Police Officer Narcisse seeking review of the County Manager's affirmation of a finding that petitioner Narcisse was involved in a "preventable" accident thereby overruling

a hearing examiner's decision. The issue on appeal is whether there was substantial, competent evidence to support such a finding. We feel there was not and reverse the County Manager's decision accordingly.

TOTAL CLIENT-SERVICE LIBRARY (trade mark) References

1 Fla Jur 2d, Administrative Law §§ 80, 82, 129, 130, 172-174; 3 Fla Jur 2d, Appellate Review §§ 344, 350

Comment Note. - Hearsay evidence in proceedings before state administrative agencies. 36 ALR3d 12.

The facts are as follows: the petitioner and a passenger (another police employee) attempted to stop a traffic violator. When that car resisted, a vehicle chase ensued resulting in a three car collision with an unrelated third party. Following a standard procedure that is operative when a county vehicle is involved in an accident, three police personnel responded to the accident scene. All three conducted independent investigations. Each concluded that the accident could not have been avoided. The petitioner was not given a traffic citation. An internal Accident Review Panel then considered the findings of the investigators and other relevant evidence to determine whether the driver could have prevented the accident, or whether due to the circumstances, the accident could not have been prevented.

According to testimony by one of the members of the Accident Review Panel, the Panel reached its decision based on the standard accident report, Narcisse's testimony and the passenger's testimony. It is unclear whether the Panel ever considered the reports of the three personnel who conducted investigations of the accident. There was a memo that reflected all three of these findings. However, the testimony as to whether the panel reviewed that memo is conflicting. Because this was the petitioner's third accident termed preventable, the Panel invoked the standard discipline for a third such accident, a one day suspension.

The petitioner appealed this decision to a Hearing Examiner. An administrative hearing was conducted. The Hearing Examiner rejected the Panel's findings. He then transmitted the record of the hearing to the County Manager, who reversed the Hearing Examiner's findings and conclusions. The petitioner now comes before this Court to review the decision of the County Manager.

Jurisdiction of this Court to hear this appeal is based on Rule 9.030(c)(1)(C) of the Florida Rules of Appellate Procedure and Dade County Code § 2-47.1

A court reviewing administrative action is limited in its scope of review to an inquiry into whether the determinative action is supported by substantial, competent evidence. United States Casualty Co. v. Maryland Casualty Co., 55 So. 2d 741 (1951). Substantial evidence is such evidence as a reasonable person would accept as adequate to support a conclusion. Laney v. Board of Public Instruction, 153 Fla. 728, 15 So.2d 748 (1943). Under Florida Statute § 120.68(10) of the Administrative Procedure Act, administrative determinations or findings are not subject to review, or will not be disturbed, if supported by substantial, competent evidence. This is analogous to the rule which

requires an appellate court to give great weight to the findings of fact made by a jury and to sustain such findings, unless there is no substantial evidence to support them. Nelson v. State, 156 Fla. 189, 23 So.3d 136, cert. den. 327 U.S. 790, 90 L.Ed 1016, 66 S.Ct. 809 (1945). Even though evidence may be conflicting, the court may not reweigh the evidence or substitute its own conclusion f the agency determination is supported by substantial, competence evidence, 1 Fla. Jur. 2d Administrative Law § 175.

However, if the findings or determinations of an administrative agency are not supported by substantial, competent evidence, they will be set aside by the Court.[1]

It is or opinion that a decision by the County Manager based on testimony that amounted to opinions and conjecture derived from second hand information does not amount to substantial, competent evidence necessary to support the County Manager's decision. The record the County Manager reviewed contained testimony from three witnesses other than Narcisse. They were: (1) a member of the Accident Review Panel (who was not present at the accident); (2) the Sergeant who prepared the petitioner's disciplinary action review (who did respond to the accident and directed traffic, but did not conduct any investigation); and (3) a major who determined the petitioner's discipline by the Accident Review Panel's findings and Narcisse's accident history.

Accordingly, we reverse the October 11, 1985, Order by the County Manager imposing a one day suspension on the petitioner.

Reversed.
HENDERSON and MASTOS, JJ., concur. 133

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[1]§ 120.68(10), Fla. Stat. (1985)

BERENGUER v. METROPOLITAN DADE COUNTY and M.R. STIERHEIM

Case No. 83-030-AP

Eleventh Judicial Circuit, Appellate Division, Dade County

July 27, 1983

After a citizen's complaint concerning the appellant, a police officer, the incident was investigated and the police officer was suspended. Using county procedures, he appealed and the hearing officer submitted a report, finding in conclusion that the suspension be rescinded. When the county manager rejected the recommended order, the officer appealed asserting denial of due process because of delay.

The court rescinded the county manager's suspension order, holding that a fourteen month delay, over protest of appellant's counsel, denied due process.

An appeal from an Administrative Order, Dade County.

Donald D. Slesnick, II, for appellant.

James A. Jurkowski, Assistant County Attorney, for appellees.

Before **BARAD, GOLDMAN, and KORVICK, JJ.**

PER CURIAM.

On March 28, 1980, Officer Randolph Berenguer responded to the residence of Hyacynth Allen Thurmond, regarding a child custody dispute. Mrs. Thurmond was at the residence.

Mrs. Thurmond filed a complaint against Officer Berenguer, claiming that he had made insulting remarks to her.

On August 6, 1980, after an investigation of the matter, Officer Berenguer was notified that he would be suspended without pay for a period of three days.

Officer Berenguer, in a timely fashion, appealed his suspension and requested a hearing. This matter came before the Hearing Examiner on January 19, 1982 and May 26, 1982. On August 29, 1982, the Hearing Examiner submitted a report, conclusion of law and recommendation. The County Attorney returned said findings to the Hearing Examiner with a request for an expanded finding of fact. Subsequently, the Hearing Examiner submitted and expanded finding of fact and a recommendation that the suspension be rescinded.

On January 17, 1983, the County Manager notified Officer, Berenguer in wiring, that he was rejecting and overturning the Hearing Examiner's recommended order and was thereby upholding Berenguer's three day suspension.

It is the finding of this Court that Officer Berenguer's Procedural Due Process Rights were violated by the excessive delay in the scheduling of his suspension appeal hearing before the Hearing Examiner. In the instant case, the suspension appeal hearing was delayed for over fourteen (14) months, over the protest of the Appellant's counsel. In fact, the Hearing Examiner, on May 26, 1982, made the following statement: "The delay of this hearing has affected the quality of the testimony that has been heard".

The fundamental requirement of Due Process is the opportunity to be heard and it is an opportunity which must be granted at a meaningful time and in a meaningful manner: Parratt v. Taylor, 451 U.S. 527 (1981); Armstrong v. Manzo, 380 U.S. 545 (1965). Government employment which allows termination only "for cause", creates such a property interest and entitles one to the constitutional protection of Due Process: Arnet v. Kennedy, 416 U.S. 134 (1974); Thurston v. Dekle, 531 F.2d 1264, 1272, (5th Cir. 1976).

Dade County has an obligation to provide hearings expeditiously. The prejudicial effect of the lengthy delay between Officer Berenguer's

suspension and hearing before the Hearing Examiner interfered with and deprived him of his rights to Due Process under the Fourteenth Amendment.

Officer Berenguer's three day suspension is hereby rescinded.

As we are reversing on a violation of Procedural Due Process, we need not address the question as to whether the County Manager's decision was supported by competent substantial evidence.

REVERSED

SEAL: **AMERICAN ARBITRATION ASSOCIATION**

12/88

Port Charlotte, FL

00082676
Pitruzzello Dr. Philip

OCCUPATION: EDUCATOR

QUALIFICATIONS: PROFESSOR OF EDUCATIONAL ADMINISTRATION, NEW YORK UNIVERSITY. TAUGHT COURSES IN LABOR-MANAGEMENT RELATIONS, INCLUDING COLLECTIVE BARGAINING, IMPASSE PROCEDURES AND ARBITRATION. HAS SERVED AS A MEDIATOR FACTFINDER AND ARBITRATOR PRIMARILY IN PUBLIC SECTOR. CASES INCLUDE DISPUTES INVOLVING FIRE-FIGHTERS, HIGHWAY EMPLOYEES, CORRECTION OFFICERS, POLICE, TEACHERS, PRISON INMATES, SCHOOL ADMINISTRATORS, CLERICAL PERSONNEL, JUNIOR COLLEGE FACULTY, HOSPITAL EMPLOYEES, TRANSIT WORKERS.
FORMERLY: CHIEF NEGOTIATOR, BOARD OF EDUCATION, HERRICKS, NEW YORK, 1962-68; CHIEF NEGOTIATOR, FAIRFIELD TEACHERS ASSN., 1951-56.

EDUCATION: CENTRAL CONNECTICUT STATE (BS-48); BOSTON UNIV. (MA-49); UNIV. OF CHICAGO (PHD.-62)

PER DIEM 400.00

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U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
FEB - 3 1995

MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-5345
Non-Argument Calendar

D.C. Docket No. 91-1131-CIV-SH

JOSE M. TOURON,

Plaintiff-Appellant,

versus

METROPOLITAN DADE COUNTY,
JOAQUIN AVINO, County Manager,
ROBERT A. GINSBURG, County Attorney,
CAROL ANDERSON, Asst County Attorney,
FRED TAYLOR, DONALD MATTHEWS, Major,
VICKI TODARO, Sergeant,
JESSE VARNELL, Sergeant,
ROBERT OTERO, Lieutenant,
AMERICAN ARBITRATION ASSOC.,
PHILIP PITRUZZELLO, Professor,

Defendants-Appellees.

Appeal from the United Sates District Court
for the Southern District of Florida

(February 3, 1995)

Before HATCHETT, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

No. 95-517

Supreme Court, U.S.
FILED
OCT 2 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

JOSE M. TOURON,

Petitioner,

v.

METROPOLITAN DADE COUNTY,
JOAQUIN AVINO, County Manager,
ROBERT A. GINSBURG, County Attorney,
CAROL ANDERSON, Asst. County Attorney,
FRED TAYLOR, DONALD MATTHEWS, Major,
VICKI TODARO, Sergeant,
ROBERT OTERO, Lieutenant,
AMERICAN ARBITRATION ASSOC.,
PHILIP PITRUZZELLO, Professor,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER A FEDERAL COURT IN A CIVIL RIGHTS ACTION SHOULD GIVE PRECLUSIVE EFFECT TO A JUDGMENT OF A STATE COURT AFFIRMING AN ADMINISTRATIVE DECISION UPHOLDING THE DISCHARGE OF A PUBLIC EMPLOYEE IF THE STATE COURT WOULD GIVE THE JUDGMENT PRECLUSIVE EFFECT.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Shelby Highsmith, Judge, U.S. District Court Judge

Stephen T. Brown, Magistrate Judge

Jose M. Touron (Petitioner/Plaintiff, pro se)

Carol Ann Anderson, Esq. (as counsel for Defendants and as defendant)

Joaquin Avino (defendant)

Robert A. Ginsburg, Esq. (defendant)

Donald Matthews (defendant)

Metropolitan Dade County (defendant)

Robert Otero (defendant)

Philip Pitruzzello (defendant)

Fred Taylor (defendant)

Vicki Todaro (defendant)

Jesse Varnell (defendant)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. THE PETITION MISREPRESENTS THE NATURE OF THE STATE COURT JUDGMENT UPON WHICH THE LOWER COURTS RELIED TO CONCLUDE THAT THIS ACTION IS BARRED BY RES JUDICATA 4

II. THIS COURT HAS ALREADY RESOLVED THE ISSUE OF WHETHER A FEDERAL COURT IN A CIVIL RIGHTS ACTION SHOULD GIVE PRECLUSIVE EFFECT TO A DECISION OF A STATE COURT AFFIRMING AN ADMINISTRATIVE DECISION 7

III. THERE IS NO CONFLICT AMONG THE LOWER COURTS AS TO WHETHER AN ADMINISTRATIVE DECISION AFFIRMED BY A STATE COURT CAN PRECLUDE A SUBSEQUENT CIVIL RIGHTS CLAIM 9

CONCLUSION 11

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974).....5, 8

Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).....7

Astoria Federal Savings & Loan Association v. Solimino, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991).....8

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981).....5

Bolling v. City and County of Denver, 790 F.2d 67 (10th Cir. 1986).....10

Carol City Utilities v. Miami Gardens Shopping Plaza, 165 So. 2d 199 (Fla. 3rd DCA 1964).....6

City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982).....6

Edmundson v. Borough of Kennett Square, 4 F.3d 186 (3rd Cir. 1993).....9

Haines City Community Develop. v. Heggs, ___ So. 2d ___, 20 Fla. L.W. 318, 1995 WL 392859 (Fla. July 6, 1995).....6

Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).....7, 8

Lee v. City of Peoria, 685 F.2d 196 (7th Cir. 1982).....10

McDonald v. City of West Branch, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984).....4

Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984).....7, 8

TABLE OF AUTHORITIES – Continued

Page

Nichols v. City of St. Louis, 837 F.2d 833 (8th Cir. 1988) 10

Osborn v. Ashland County Board of Alcohol, Drug Addiction & Mental Health Services, 979 F.2d 1131 (6th Cir. 1992) 9

Sanchez v. City of Santa Ana, 936 F.2d 1027 (9th Cir. 1990), *cert. denied*, 502 U.S. 957, 112 S. Ct. 417, 116 L. Ed. 2d 437 (1991) 10

Sharpley v. Davis, 786 F.2d 1109 (11th Cir. 1986) 10

Swineford v. Snyder County, Pa., 15 F.3d 1258 (3rd Cir. 1994) 9

United States Fidelity & Guaranty Co., 444 So. 2d 78 (Fla. 5th DCA 1984) 6

University of Tennessee v. Elliot, 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986) 8

Welch v. Johnson, 907 F.2d 714 (7th Cir. 1990) 10

STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

28 U.S.C. § 1738 ..... 4, 7

42 U.S.C. § 1983 ..... 1, 3, 7, 10

Section 2-47, Code of Metropolitan Dade County, Florida 2, 3, 5

Section 2-47.1, Code of Metropolitan Dade County, Florida 3, 5, 6

OPINIONS BELOW

The opinions below are unreported. The district court's opinion is reprinted in the Petitioner's Appendix at pages 3 through 13. The opinion of the Eleventh Circuit Court of Appeals affirming the district court's decision has not been included in the Petitioner's Appendix, but is added as an appendix to this Response. (Respondents' Appendix at 1). The Eleventh Circuit's order denying rehearing and rehearing en banc is included in the Petitioner's Appendix at pages 1-2.

JURISDICTIONAL STATEMENT

The Petition falls within the Court's jurisdiction to review final decisions of the federal courts of appeal by certiorari. 28 U.S.C. § 1254. The lower courts had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

STATEMENT OF THE CASE

The only issue raised by this Petition is whether the lower courts properly concluded that this § 1983 action is precluded by a state court judgment affirming an administrative decision upholding the Petitioner's discharge from public employment. Because the issue is so narrow, the relevant facts can be stated much more succinctly than they are in the Petition.

The Petitioner, Jose Touron (hereinafter, Touron), was employed by the Respondent, Metropolitan Dade County

(hereinafter, the County), as a police officer. (Petitioner's Appendix at 36) (hereinafter, Pet. App. at ___). He was discharged for informing a suspect that he was under investigation for dealing narcotics and then telling the suspect not to identify him as the source of the information. (Pet. App. at 39). As a permanent civil service employee, Touron had the right to appeal his discharge to an independent hearing examiner under § 2-47 of the Metropolitan Dade County Code, the provisions of which are incorporated into a collective bargaining agreement between the County and the Dade County Police Benevolent Association, the union that represents all County police officers. (Pet. App. at 16-17, 25-30).

In accordance with the Code, a hearing examiner was appointed by the American Arbitration Association (AAA). (Pet. App. at 4). Although hearing examiners are supplied by the AAA, they do not actually serve as arbitrators. *Id.* Instead their authority is limited to making "findings of facts, conclusions and any recommendations" and transmitting them to the County Manager, "who may sustain, reverse or modify the . . . dismissal." (Pet. App. at 17).

At the appeal hearing, Touron was represented by counsel, and was given the opportunity to conduct discovery, submit evidence, call and cross-examine witnesses, and offer argument. (Pet. App. at 4-5). Upon completion of the hearing, which lasted six days, the hearing examiner issued a written report concluding that Touron had committed the acts alleged and recommending that his request for reinstatement, back pay and benefits be denied. (Pet. App. at 52-55). He suggested,

however, that the County consider offering Touron reemployment as a probationary police officer if he was willing to acknowledge the mistakes he had made. *Id.* The County Manager accepted the hearing examiner's findings and recommendations that Touron not be reinstated, but rejected the suggestion that he be offered a chance at reemployment. (Pet. App. at 56-57).

Touron appealed the Manager's decision, pursuant to § 2-47.1 of the Dade County Code, to the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit of Florida. (Pet. App. at 14). On appeal, Touron argued that his discharge should be set aside because he was denied due process under the United States Constitution, was not afforded sufficient opportunity to cross-examine and challenge evidence presented against him, and for other reasons identical to those presented in the complaint in this action. (Pet. App. at 6). A three-judge panel of the state Circuit Court affirmed the County Manager's decision. (Pet. App. at 14).

Touron then filed the Complaint in this action. The Complaint alleges that the County and a variety of County officials violated 42 U.S.C. § 1983 by denying Touron his constitutional rights to due process and equal protection in connection with his discharge. (Pet. App. at 6). The district court granted summary judgment on the basis of res judicata and the Eleventh Circuit Court of Appeals affirmed per curiam. (Resp. App. at 1). The Eleventh Circuit denied Touron's motion for rehearing or rehearing en banc. (Pet. App. at 1).

REASONS FOR DENYING THE WRIT

There are at least three reasons for denying this Petition for Writ of Certiorari. First, the Petitioner has misrepresented the material facts by suggesting that the lower courts have held that this action is precluded by an unreviewed arbitration decision. In fact the judgment upon which the lower courts relied to preclude this action is a state court judgment which affirmed an administrative decision. Second, this Court has already held that federal civil rights actions can be precluded by state court judgments affirming administrative decisions, similar to the one entered in this case, in accordance with the Full Faith and Credit Statute, 28 U.S.C. § 1738. Third, this Court's previous decisions have not left any conflict among the lower courts: every appellate court that has considered the matter in the last fifteen years has agreed that a state court judgment affirming an administrative decision precludes a federal action to the same extent as the judgment would preclude an action in state court.

I. THE PETITION MISREPRESENTS THE NATURE OF THE STATE COURT JUDGMENT UPON WHICH THE LOWER COURTS RELIED TO CONCLUDE THAT THIS ACTION IS BARRED BY RES JUDICATA

Throughout the Petition, Touron refers to the civil service decision and state court judgment affirming that decision as a "arbitration award". From this erroneous statement, he argues that the lower courts failed to follow this Court's holdings in such cases as *McDonald v. City of West Branch*, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302

(1984) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981), that an arbitration decision does not preclude a subsequent federal statutory claim for discrimination. *See also, Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974).

This case, however, does not involve an arbitration decision and is therefore not governed by this Court's previous decisions concerning the effect of an arbitration award on a subsequent federal statutory claim. The decision which the lower courts have held precludes this action is not an arbitration award but a state court judgment affirming an administrative proceeding. As the district court explained, "it is important to note that the role of the American Arbitration Association was only in the appointment of a hearing examiner, and the hearing was conducted pursuant to applicable sections of the County Code." (Pet. App. at 4). In accordance with the Dade County Code, the hearing examiner acted in the role of a factfinder, making a recommendation to the County Manager, not as a final and binding arbitrator. Dade County Code § 2-47 (Pet. App. at 16-17). The hearing examiner's recommendation and the Manager's final decision were subject to direct review in state court, in accordance with Dade County Code § 2-47.1 (Pet. App. at 18-19). It is the state court's order affirming the Manager's decision, and not the hearing examiner's recommendation or even the Manager's final decision, that constitutes the judgment

that precludes this action under the doctrine of res judicata.[1]

---

[1] Touron's suggestion that the state appellate court's review was by discretionary certiorari is simply incorrect. Under the County Code, review of the Manager's decision in disciplinary matters is a matter of right. *Code of Metropolitan Dade County* § 2-47.1 (Pet. App. at 18-19). Touron's reliance upon a variety of cases holding that a denial of certiorari does not constitute a judgment for purposes of res judicata is therefore entirely misplaced. Although appellate review of administrative decisions in Florida has occasionally been referred to as review by certiorari, the Florida Supreme Court has long recognized that when the review is made available as a matter of right, it is not "truly discretionary common-law certiorari." *Haines City Community Develop. v. Heggs*,___ So. 2d ___, 20 Fla. L.W. 318, 1995 WL 392859 (Fla. July 6, 1995). *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982) (if the appeal is a matter of right, judicial review of a civil service decision is effectively an appeal regardless of whether it is labeled as a petition for certiorari). The Florida courts have also long held that administrative decisions, especially when affirmed by a state court, are entitled to full res judicata effect. *See, e.g., United States Fidelity & Guaranty Co.*, 444 So. 2d 78, 80 (Fla. 5th DCA 1984) ("Where an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, as to which the parties have had an adequate opportunity to litigate, the court will apply res judicata or collateral estoppel to enforce repose."); *Carol City Utilities v. Miami Gardens Shopping Plaza*, 165 So. 2d 199 (Fla. 3rd DCA 1964) ("The doctrine of estoppel by judgment applies to administrative findings which are of a quasi-judicial nature, particularly when judicial review of these findings has been exhausted."). This issue of Florida law is not properly a matter for this Court to decide in any event.

II. THIS COURT HAS ALREADY RESOLVED THE ISSUE OF WHETHER A FEDERAL COURT IN A CIVIL RIGHTS ACTION SHOULD GIVE PRECLUSIVE EFFECT TO A DECISION OF A STATE COURT AFFIRMING AN ADMINISTRATIVE DECISION.

In *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980), this Court held that the Full Faith and Credit Statute, 28 U.S.C. § 1738, requires federal courts to give a state court judgment the same preclusive effect in a civil rights action as a state court would give to that judgment under the law of the state in which the judgment was rendered. In *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984), the Court considered an issue left open by *Allen*, whether the preclusive effect of a state court judgment applies "to a federal issue that a § 1983 litigant could have raised but did not raise in the earlier state court proceeding." *Id.* at 83, 104 S. Ct. at 892. The Court held that § 1983 "does not override state preclusion law" and therefore that a "state-court judgment . . . has the same preclusive effect in federal court that the judgment would have in" the courts of the state where the judgment was first rendered. *Id.* at 85, 104 S. Ct. at 898.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982), the Court considered the application of res judicata to a state court judgment that affirmed an administrative decision. The Court held that the Full Faith and Credit Statute, 28 U.S.C. § 1738, requires federal courts to give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination

claim if the state court's decision would be res judicata in the state's own courts. 456 U.S. at 463, 102 S. Ct. at 1888. The Court distinguished cases such as *Alexander v. Gardner-Denver* which dealt only with an arbitration award:

> The holding in *Gardner-Denver* was that a private arbitration decision concerning an employment discrimination claim did not bind the federal courts. Arbitration decisions, of course, are not subject to the mandate of § 1738.

456 U.S. at 477, 102 S. Ct. at 1895.

The Courts' subsequent decisions have not varied from the holdings of *Allen*, *Migra* and *Kremer*. In *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986), for example, the Court held that "when a state agency acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . the federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the state's courts." *Id.* at 799, 106 S. Ct. at 3226. *Compare Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991) (*unreviewed* state administrative decision did not preclude claim under the Age Discrimination in Employment Act).

The lower courts in this action did nothing more than follow this Court's well-established precedent. As the district court explained, while it is true that private arbitration decisions do not preclude subsequent federal actions, this case does not involve an arbitration but an administrative proceeding affirmed by subsequent state

court review. (Pet. App. at 11). It is the state court judgment that serves as the basis for concluding that this action is barred by res judicata.

III. THERE IS NO CONFLICT AMONG THE LOWER COURTS AS TO WHETHER AN ADMINISTRATIVE DECISION AFFIRMED BY A STATE COURT CAN PRECLUDE A SUBSEQUENT CIVIL RIGHTS CLAIM

Touron's suggestion that the Court should accept certiorari to resolve a conflict amongst the circuits as to whether an arbitration decision can preclude a subsequent federal action is, like all of his other arguments, based on the erroneous assumption that the lower courts relied on an arbitration decision to conclude that this action is precluded. Once it is understood that the decision that precludes this action is a state court judgment which affirmed an administrative decision, the alleged conflict disappears. Every circuit court of appeals that has considered the issue has held, as the lower courts did in this case, that a state court judgment affirming a civil service decision can preclude a subsequent civil rights claim. *See, e.g., Swineford v. Snyder County, Pa.*, 15 F.3d 1258, 1266 (3rd Cir. 1994) ("[W]hen adjudicating Reconstruction Civil Rights laws, federal courts must give the same preclusive effect to state agency findings as would the state courts when the agency, acting in a judicial capacity, resolves disputed issues of fact."); *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3rd Cir. 1993) ("Decisions of state administrative agencies that have been reviewed by state courts are . . . given preclusive effect in federal courts."); *Osborn v. Ashland County Board*

of Alcohol, Drug Addiction & Mental Health Services, 979 F.2d 1131, 1133 (6th Cir. 1992) (state court's review of administrative decision upholding the plaintiff's discharge precluded subsequent § 1983 action for violation of due process); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1035-36 (9th Cir. 1990), *cert. denied*, 502 U.S. 957, 112 S. Ct. 417, 116 L. Ed. 2d 437 (1991) (federal constitutional claims precluded by state court appellate judgment affirming personnel board's decision upholding police officer's termination); *Welch v. Johnson*, 907 F.2d 714 (7th Cir. 1990) (section 1983 and Title VII claims barred by state court judgment affirming civil service commission decision upholding employee's discharge); *Nichols v. City of St. Louis*, 837 F.2d 833 (8th Cir. 1988) (state court judgment affirming civil service commission's decision upholding public employee's discharge precluded federal action for age discrimination); *Bolling v. City and County of Denver*, 790 F.2d 67 (10th Cir. 1986) (state court judgment affirming civil service board's decision upholding public employee's discharge precluded federal civil rights claims); *Sharpley v. Davis*, 786 F.2d 1109 (11th Cir. 1986) (state court judgment affirming board of education's decision to discharge employee barred any federal constitutional claim which was raised or could have been raised in the state proceeding); *Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982) (state court judgment affirming board of police commissioner's decision to discharge police officer barred any subsequent federal claim that was brought or could have been brought in the state court proceeding).

CONCLUSION

The Court should deny the Petition for Writ of Certiorari because it raises an issue that is neither new nor controversial. The lower courts did nothing more than follow this Court's well-established precedent, holding that a federal civil rights claim can be precluded by a state court judgment affirming an administrative decision to the same extent that such a claim would be precluded in state court. Accordingly, the Respondents respectfully urge the Court to deny the Petition for Certiorari.

Respectfully submitted,

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DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-5345
Non-Argument Calendar

D.C. Docket No. 91-1131-CIV-SH

JOSE M. TOURON,

Plaintiff-Appellant,

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Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(February 3, 1995)

Before HATCHETT, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

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(3)

Supreme Court, U.S.
FILED
OCT 23 1995
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No.: 95-517

IN THE

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October Term, 1995

JOSE M. TOURON,

Petitioner,

vs.

METROPOLITAN DADE COUNTY, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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11 PP

TABLE OF CONTENTS

Page

Table of Authorities ii

Statutes iii

Reply to Respondents' Brief in Opposition 1

TABLE OF AUTHORITIES

Pages

Accent Realty of Jacksonville v. Crudele,
496 So.2d 158 (Fla. 3d DCA 1986) 6

Allen v. McCurry,
449 U.S. 90, 101 S.Ct. 441 (1980) 1

Collier v. City of Homestead,
81 So.2d 201 (Fla. 1955) 6

Daugherty v. Sarasota County, Florida,
157 F.R.D. 542 (M.D. Fla. 1994) 3,4,5

Don Mott Agency, Inc. v. Harrison,
362 So.2d 56 (Fla. 2d DCA 1978) 6

FIGA v. Celotex Corp.,
547 So.2d 696 (Fla. 4th DCA 1989) 6

Haines City Community Development v. Heggs,
658 So.2d 523 (Fla. 1995) 4

Keay v. City of Coral Gables,
236 So.2d 133 (Fla. 3d DCA 1970) 5,6

Narcisse v. Dade County,
20 Fla. Supp.2d 131 (Fla. 11th Jud.
Cir. App. Div. 1986) 3

Tucker v. Resha,
610 So.2d 460 (Fla. 1st DCA 1992) 6

STATUTES

Pages

Section 2-47, Code of Metropolitan Dade County, Florida 2,3

Section 2-47.1, Code of Metropolitan Dade County, Florida 3

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' claims that Petitioner has misrepresented facts to the Court are spurious; it is a bold-faced attempt to cloud the issues.

Respondents claim that the arbitrator was not an arbitrator but a "hearing examiner." This is a question of semantics. In fact, the hearing examiner refers to himself as an "arbitrator" (See App. 34, Petition for Writ of Certiorari). Be that as it may, the role of the hearing examiner was the same, his title is of no consequence; the County will be appeased, and the arbitrator shall be referred to as a hearing examiner. The hearing examiner's actions were not, in any event, final and binding, and were limited in scope of review; he could not hear a violation of civil rights because he lacked subject matter jurisdiction. As a point of fact, Petitioner sought review of the hearing examiner's report and recommendation, and the County Manager's decision, only upon order of the Court. See Petitioner's Appendix to Petition for Writ of Certiorari, App. 58-61.

Assuming arguendo, that the County Manager's decision was the decision reviewed by the Eleventh Judicial Circuit, res judicata still does not apply to bar Petitioner's claims. In Allen v. McCurry, 449

U.S. 90, 101 S.Ct. 441 (1980), this Court pointed out that a decision rendered by a court may preclude relitigation of the issue in a suit on a different cause of action. But those issues of fact or law reviewed must be necessary to its judgment. A review of the County Manager's decision would not have included a review of Petitioner's claims of violation of civil rights because those issues would not have been properly before the Eleventh Judicial Circuit Appellate Division.[1] In fact, the County Manager's decision is nothing more than a rubber stamp, a standard, institutionalized letter. See App. 56-57, Petition for Writ of Certiorari. If the County Manager and the Eleventh Judicial Circuit Appellate Division had read the entire file, they would have realized that there was a gross miscarriage of justice: a violation of Dade County Ordinance 2-47 (See App. 17 and 29, Petition for Writ of Certiorari), thus rendering the entire process infirm thus causing the Eleventh Judicial Circuit Appellate Division to lack subject matter jurisdiction. The Eleventh Judicial Circuit Appellate Division is duty-

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[1]Of course, we will never know the scope of the Eleventh Judicial Circuit Appellate Division review since their decision was rendered as a P.C.A., per curiam affirmed, without an opinion.

bound to uphold and enforce Dade County Ordinance 2-47 and a review of the file would have revealed its violation by Respondents. See App. 64, Petition for Writ of Certiorari; Narcisse v. Dade County, 20 Fla. Supp.2d 131 (Fla. 11th Jud. Cir. App. Div. 1986)("Jurisdiction of this Court to hear this appeal is based on Rule 9.030(c)(1)(C) of the Florida Rules of Appellate Procedure and Dade County Code § 2-47.1.").

Daugherty v. Sarasota County, Florida, 157 F.R.D. 542 (M.D. Fla. 1994), addresses the issue of res judicata as applied to the review of an administrative agency decision. In that case, the Plaintiff filed a complaint for violation of civil rights under § 1983 for deprivation of property without just compensation. Plaintiff wanted to use certain real property as a commercial borrow pit and had submitted permit applications to the Defendant several times, each time being denied permission. The Plaintiff eventually turned to the courts for judicial review of the denial of permit applications by writ of certiorari. The court denied the writ of certiorari without an opinion, after which the Plaintiff filed the suit for violation of his civil rights. Defendant sought summary judgment on grounds that res judicata barred the

action. The trial court held that the denial of the writ of certiorari, without an opinion, did not constitute res judicata. The trial court found that none of the issues in the case before it could have been properly brought in a petition for writ of certiorari since the review would have been limited to the record of the commission hearings of the permit requests. Similarly, in this case, res judicata should not attach because Petitioner could not have properly brought violation of his civil rights in a petition for writ of certiorari. As the Florida Supreme Court pointed out in Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995), the appellate court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. The court only looks to see if procedural due process was afforded and whether the correct law was applied. The Eleventh Judicial Circuit Appellate Division could only review the County Manager's decision, which was not even properly before it due to procedural violations occurring prior to the County Manager's review. And, again, there is no way of knowing whether or not the correct law was applied since there is no written opinion.

As a basis for its decision, the Daugherty court cited to Keay

v. City of Coral Gables, 236 So.2d 133 (Fla. 3d DCA 1970), which also held that a denial of petition for writ of certiorari cannot be construed as passing upon any of the issues in the litigation. While Daugherty and Keay are denials of petitions for writ of certiorari, and the court action which is the basis of this appeal is a per curiam affirmance, all have one thing in common: there was no written opinion. There is no way that anyone can determine what the decisions in Daugherty and Keay were based upon, nor what the Eleventh Judicial Circuit Appellate Division reviewed in this case. For this reason, res judicata should not apply where there is no written opinion affirming an administrative agency decision.

Addressing Respondent's second point, that this Court has already resolved the issue regarding the preclusive effect of state court affirmance of an administrative decision, this Court has not affirmatively resolved this issue. No where has the Court addressed the issue of res judicata as applied to a non-binding arbitration brought under a Collective Bargaining Agreement where the hearing examiner lacked subject matter jurisdiction and the subsequent review by a state court (of an action taken under a Collective Bargaining Agreement) did

not address the issues presented in federal court (Title VII). Nor is there any law regarding the effect given to a decision rendered without a written opinion.

Finally, Respondents argue that decisions rendered by administrative agencies, which would be given preclusive effect in state court, should be given preclusive effect in federal court. Petitioner does not argue this point except to point out that the state court (Eleventh Judicial Circuit, Dade County, Florida) has not given preclusive effect to the administrative agency decision which is the basis of this appeal nor could it for the following controlling case law: Keay v. City of Coral Gables, 236 So.2d 133 (Fla. 3d DCA 1970); Don Mott Agency, Inc. v. Harrison, 362 So.2d 56 (Fla. 2d DCA 1978); Accent Realty of Jacksonville v. Crudele, 496 So.2d 158 (Fla. 3d DCA 1986); Collier v. City of Homestead, 81 So.2d 201 (Fla. 1955); FIGA v. Celotex Corp., 547 So.2d 696 (Fla. 4th DCA 1989); and Tucker v. Resha, 610 So.2d 460 (Fla. 1st DCA 1992).

One final point: cases cited by the Respondent are cases not involving Title VII issues. However, Petitioner's cases address Title VII issues, as does his own case presently before this Court also entail

Title VII issues.

CONCLUSION

For the reasons stated in the foregoing Reply to Respondents' Brief in Opposition and in the Petition for Writ of Certiorari, this Court should accept jurisdiction, granting certiorari, and reversing the trial court's decision and remanding this case for trial.

Respectfully submitted,

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